ARULPRAGASAN SANDARAJU

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' SERI MOHD EUSOFF CHIN CJ
TAN SRI DATO' LAMIN MOHD YUNUS PCA
TAN SRI DATO' ANUAR ZAINAL ABIDIN CJ (MALAYA)
TAN SRI DATO' MOHD AZMI KAMARUDDIN FCJ
TAN SRI DATO' EDGAR JOSEPH JR FCJ
DATO' PADUKA MOHAMED DZAIDDIN ABDULLAH FCJ
DATO' WAN ADNAN ISMAIL FCJ
[CRIMINAL APPEAL NO: 05-237-92]
27 JULY 1996

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof required - Whether prima facie case or beyond reasonable doubt case.*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof required - Criminal Procedure Code, ss. 180 & 183 - Whether there is distinction in standard of proof required - Distinction between burden and quantum of proof.*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Criminal Procedure Code, ss. 180 & 214(2) - Distinction - Jury & non-jury trials - Importance of dichotomy - Distinction between 'legal sufficiency' of evidence and 'quality & reliability' of evidence.*

CRIMINAL PROCEDURE: *Criminal Procedure Code, s. 180 - 'if unrebutted would warrant a conviction' - Interpretation.*

CRIMINAL PROCEDURE: *Prosecution - Onus of proof - Whether on the prosecution all the time - Whether only one standard of proof throughout entire prosecution case - Criminal Procedure Code, s. 180.*

CRIMINAL PROCEDURE: *Accused - Right of silence - Exercise of - Whether Court must convict forthwith if accused also calls no witnesses.*

CRIMINAL PROCEDURE: *Appeal - Record of appeal - Litigants - Appellate Court - Whether entitled to complete and accurate copies of record of appeal - Whether of fundamental importance.*

EVIDENCE: *Burden of proof - Close of prosecution - Whether every ingredient must be proven - Duty of Court to evaluate evidence - Criminal Procedure Code, s. 180.*

EVIDENCE: *Standard of proof - Close of prosecution - Whether prima facie standard or beyond reasonable doubt standard more favourable to accused.*

CONSTITUTIONAL LAW: *Courts - Ratio decidendi - Meaning of - Rule of law necessary to reaching decision - Whether ruling must be on a disputed point of law.*

CONSTITUTIONAL LAW: *Courts - Stare decisis - Concurrent jurisdiction - When may later Court depart - Per incuriam - Obiter dicta - Judicial creativity - Development of law.*

STATUTORY INTERPRETATION: *Construction of statutes - Plain, literal and grammatical meaning - Contradiction with purpose of Act - Absurdity - Ambiguity - Whether Court can go on a 'voyage of discovery'.*

This was an appeal by the appellant against the decision of the learned Judicial Commissioner ('the JC') of the High Court at Penang in finding him guilty of drug trafficking under s. 39B(1) of the Dangerous Drugs Act 1952 ('the Act') and sentencing him to death under s. 39B(2) of the Act. The substantive ground of the appeal was anchored on a legal point, ie, that the JC had misdirected himself in law in applying the principle enunciated in the trilogy of *Haw Tua Tau v. PP*; *Ragunathan v. PP*; and *Munusamy v. PP* ('the HTT test'). At the close of the prosecution's case, the JC had applied the HTT test and, upon an evaluation of the prosecution's evidence therewith, found the element of possession to have been established. He, therefore, called upon the appellant to enter on his defence, but suspended his finding on the credibility of the prosecution's witnesses until the close of the defence's case. In the result, the JC found that the appellant had neither raised any reasonable doubt in respect of possession, nor rebutted the presumptions under s. 37(d) & (da) read together with s. 2 of the Act.

In the instant appeal, the appellant submitted that the JC had erred in law in applying the HTT test, and in failing to direct his mind to the pivotal principle laid down by the Supreme Court in *Khoo Hi Chiang v. PP*, ie: that the duty of the Court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution's evidence is inherently incredible, but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

Consequently, the primary question of law which arose for decision in the instant appeal was pinned on the standard of proof that is required of the prosecution at the close of its case by s. 180 of the Criminal Procedure Code

('the CPC'), in criminal trials before a Judge of the High Court sitting alone, in order that the Judge may rule that there is a case for the accused to answer.

Held:

Per Eusoff Chin CJ (majority decision):

[1] The burden of proof is on the prosecution to prove every ingredient which constitutes the offence with which the accused is charged. If, at the close of the case for the prosecution, every ingredient is proved, then there is a case for the accused to answer.

[2] When the case for the prosecution is concluded, it is the duty of the Court to scrutinise and evaluate the evidence and to decide whether or not there is a case for the accused to answer.

[3] If the accused is called upon to enter his defence, three alternatives are open to him by which he can rebut the prosecution's case. These must be explained to the accused, and they are: (i) he can give evidence on oath from the witness box and be subject to cross-examination; (ii) he can give an unsworn statement from the dock; or (iii) he can remain silent. Whichever alternative the accused elects, he is at liberty to call witnesses to testify on his behalf.

[4] If the accused elects to remain silent and calls no witnesses or produces no documents in his own defence, then he will have failed to rebut the prosecution's case, and the Court must be prepared, there and then, to convict him. This is the requirement of s. 180 of the CPC.

[5] The primal issue in the instant appeal was the standard of proof required of the prosecution at the close of its case, having regard to s. 180 of the CPC; whether it is proof beyond reasonable doubt, or a mere *prima facie* supposition that the accused may be guilty. It is trite law that the onus is on the prosecution throughout the entire case in any criminal trial to prove the charge against the accused beyond reasonable doubt. The same standard of proof applies at the intermediate stage of the trial, ie, at the close of the case for the prosecution.

Held:

Per Lamin PCA (majority decision):

[1] The onus of proof is all the time on the prosecution. That being so, the standard of proof required of the prosecution to prove its case for the purpose of deciding whether or not to call on the accused to enter his defence must be proof 'beyond reasonable doubt' and nothing less.

[2] If, on weighing the evidence at the end of the prosecution's case and upon such evidence 'standing alone' (meaning 'if unrebutted'), the Court is satisfied that it would be 'wholly unsafe to convict' (meaning 'no case has been made out which if unrebutted would warrant his conviction'), then the accused should not be called on for his defence.

[3] Section 180 of the CPC stipulates that there is only one standard of proof throughout the prosecution's case. This must mean that the accused would only be called on for his defence if, at the close of the prosecution's case, it would be safe to convict on the evidence of the prosecution. This also means that the prosecution has to prove every ingredient of the charge and, at the close of its case, the Court shall evaluate all the admissible evidence as adduced and relevant to the charge and decide whether or not to call on the accused to enter his defence.

[4] If, at the close of the prosecution's case, the accused is called on for his defence and he opts to remain silent, then he shall be found guilty forthwith. Consequently, in order for the Court to decide to call on the accused for his defence, there must be the kind of evidence before the Court upon which it is entitled to make up its mind that the accused has committed the offence and to find him guilty forthwith if no rebuttal evidence from him is forthcoming. This suggests that the Court is required to undertake a 'maximum evaluation' of the evidence at the close of the case for the prosecution.

Cases referred to:
PP v. Chin Yoke [1940] MLJ 47 ***(refd)***
Allan [1969] 1 WLR 33 ***(refd)***
Hornal v. Neuberger Products Ltd. [1957] 1 QB 247 ***(refd)***
Bater v. Bater [1951] P 35 ***(refd)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 ***(cit)***

Held:

Per Mohd Azmi FCJ (dissenting):

[1] For the purpose of our CPC, and in the context of the two-tier approach in criminal trials before a single Judge, a *prima facie* case under s. 180 is dissimilar to a 'beyond reasonable doubt' case on the guilt of an accused under s. 183. It is neither the function nor the duty of the Court, under s. 180 of the CPC, to decide on the guilt of an accused.

[2] *Khoo Hi Chiang v. PP* had not succeeded in abolishing the *prima facie* test under s. 180 of the CPC; for to have replaced it with the 'guilty beyond reasonable doubt' test, the Supreme Court must have discussed,

which it did not, how such a drastic legal proposition could be reconciled with the cardinal principles of criminal law, namely: (i) that the general burden of proof on the guilt of an accused is always on the prosecution throughout the whole trial and that it never shifts; (ii) that the presumption of innocence hitherto enjoyed by the accused is an essential ingredient of fair trials in our adversarial system of criminal justice; and (iii) the two-tier structure of our criminal trials, as embodied in ss. 180 and 183 of the CPC.

[3] Section 180 of the CPC has been consistently interpreted by our superior Courts as requiring a *prima facie* test. The pronouncement in *Khoo Hi Chiang v. PP*, purporting to hold that a case 'which if unrebutted would warrant a conviction' is a 'beyond reasonable doubt' case on the guilt of the accused, was made *per incuriam* for the four following reasons, namely, that the Supreme Court had: (i) erroneously substituted the word 'case' as used by the Legislature in s. 180 of the CPC with the word 'evidence', and thus failed to consider s. 183 and the crucial distinction between burden of proof and quantum of proof; (ii) given insignificant weight to the words 'if unrebutted' in s. 180 of the CPC, and relied excessively on the difference between jury and non-jury trials to the exclusion of the basic principles of statutory interpretation; (iii) relied unnecessarily on the Singapore case of *Ong Kiang Kek v. PP* which had been reversed and had ceased to be followed; and (iv) misread the decision of the Privy Council in *Haw Tua Tau v. PP* on the burden of proof as mere *obiter dicta*.

[4] The Court is not permitted to substitute the word 'case' (which is a question of law) in s. 180 of the CPC with the word 'evidence' (which is a question of fact). To do so would be wholly unjustified and wrong in law, and would amount to making an unauthorised amendment to a statutory provision which touches on the liberty of the subject. A legislative intervention is strictly necessary before the word 'case' can be substituted with the word 'evidence'.

[5] Section 180 of the CPC deals with the burden of proof, not the quantum of proof. To require a trial Judge to find an accused, in fact and in law, guilty beyond reasonable doubt under s. 180 of the CPC would not only be contrary to the principle of fair trial in our adversarial system of criminal justice, but also inconsistent with the requirement of the phrase 'if unrebutted' read together with s. 183(1) and (2) of the CPC. What chance would an accused have of earning an acquittal at the conclusion of his trial if the Court were obliged to decide at the close of the prosecution that he was already guilty of the charge beyond any reasonable doubt?

[6] From its hypothetical language, it is obvious that s. 180 of the CPC cannot refer to the second stage of the criminal trial, and that the words 'if unrebutted would warrant a conviction' must relate entirely to the nature of the case to be made out by the prosecution before there can be a case to answer; it is a question of law and not of evidence. Section 180 of the CPC solely governs the prosecution; it imposes no onus on the accused to rebut the case made out by the prosecution under it. The cumulative effect of ss. 178 to 183 of the CPC also indicates that s. 180 is not intended to govern the second stage of the criminal trial.

[7] Consequently, it is wrong to whittle down the cardinal principle of our criminal law on the presumption of innocence by interpreting s. 180 of the CPC in such a way that it imposes a duty on the trial Judge to find the accused guilty beyond reasonable doubt prematurely at the close of the prosecution, as well as a heavier burden on the accused to rebut the prosecution's case, when in law, the defence's duty is merely to raise a reasonable doubt to earn an acquittal. The *prima facie* interpretation of s. 180 of the CPC is, thus, more consistent with the concept of fair trial under natural justice and the principles of criminal law, and must, therefore, be preserved as an indispensable requirement of justice.

[8] For the purpose of establishing a *prima facie* case under s. 180 of the CPC, the Court should not accept any evidence as credible unless they are 'beyond reasonable doubt' evidence. However, such acceptance need not be conclusive on the guilt of the accused but should only be on the hypothetical basis that no further evidence is forthcoming. As such, the Court must keep an open mind on the question of guilt until the conclusion of the trial. This is, therefore, quite different and distinct from the process of finding the accused guilty beyond reasonable doubt under s. 183 of the CPC. It is grievously fatal to ignore the hypothetical nature of s. 180 of the CPC.

[9] There is, in effect, no conceptual difference between the *prima facie* test in *Haw Tua Tau v. PP* and the other test on the burden of proof, provided, the trial Judge bears in mind that the 'beyond reasonable doubt' test may only be applied on a hypothetical basis at the close of the prosecution's case due to the words 'if unrebutted' in s. 180 of the CPC. Be that as it may, to avoid practical difficulties, particularly in the lower Courts, Judges in Malaysia should continue to use the *prima facie* test which has served us well.

[10] *Ong Kiang Kek v. PP*, a decision on which *Khoo Hi Chiang v. PP* had relied heavily, is no longer good law, having being overruled by *Haw Tua Tau v. PP*. It is already a 'dead horse' both in Malaysia (by virtue of *Ragunathan v. PP*; *Munusamy v. PP*; *Junaidi bin Abdullah v. PP*; and *Pavone v. PP*), and in its country of origin, Singapore (by virtue of *Abdul Ghani v. PP* and *Ng Theng Shuang v. PP*). This is also the position in Brunei (*Yeo Tse Soon v. PP*).

[11] There was no justification for *Khoo Hi Chiang v. PP* to treat the decision of the Privy Council in *Haw Tua Tau v. PP* on the burden of proof at the close of the case for the prosecution as *obiter dicta*. And since this was the principal basis of *Khoo Hi Chiang v. PP*, the judgment of the Supreme Court therein must necessarily be defective.

[12] An accused person is entitled to a fair trial in which the relevant laws, including the onus of proof, are correctly applied by the trial Judge. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice.

[13] In our judicial system, it is essential that the principle of *stare decisis* is strictly applied. But where the ruling of a previous Court of superior or concurrent jurisdiction is unclear or is made *per incuriam*, a later Court is enticed to depart from it. If it is unclear what the *ratio decidendi* was, then it is not part of a later tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it. No guidance is more misleading than an *obiter dictum*.

[14] The rule of law, upon the construction of all statutes, is to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity. The words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited. It is not for the Judges, under the guise of interpretation, to provide their own preferred amendments to statutes.

Cases referred to:
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 ***(not foll)***
Ong Kiang Kek v. PP [1970] 2 MLJ 283 ***(not foll)***
Pavone v. PP [1984] 1 MLJ 77 ***(aff)***
Haw Tua Tau v. PP [1982] AC 136 ***(foll)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(foll)***
Munusamy v. PP [1987] 1 MLJ 492 ***(foll)***

Ragunathan v. PP [1982] 1 MLJ 139 ***(foll)***
Junaidi bin Abdullah v. PP [1993] 4 CLJ 201 ***(foll)***
Mah Kok Cheong v. R [1953] MLJ 46 ***(foll)***
Mohamed Din v. PP [1985] 2 MLJ 251 ***(foll)***
Yeo Tse Soon v. PP [1995] 2 CLJ 179 ***(refd)***
Great Western Railway Co. v. Owners of SS Mostyn [1928] AC 57 ***(refd)***
Non-Metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks Sdn. Bhd. [1976] 2 MLJ 67 ***(refd)***
London & North Eastern Railway Co v. Berriman [1946] AC 278 ***(refd)***
Magor & St Mellons RDC v. Newport Corp. [1952] AC 189 ***(refd)***
Duport Steels Ltd. v. Sirs [1980] 1 WLR 142 ***(refd)***
Woolmington v. DPP [1935] AC 462 ***(refd)***
PP v. Fong Ah Tong & Cheong Chi Shen [1940] MLJ 240 ***(refd)***
River Wear Comrs v. Adamson [1877] 2 AC 743 ***(refd)***
Krishna Murthy v. Abdul Subban [1965] 1 CrLJ 565 ***(refd)***
Abdul Ghani v. PP [1985] 1 MLJ 93 ***(refd)***
PP v. Goo Kian [1939] MLJ 291 ***(cit)***
PP v. Lim Teong Seng & Ors [1946] 12 MLJ 108 ***(cit)***
PP v. Chin Yoke [1940] MLJ 47 ***(cit)***
PP v. Balasubramaniam [1948] MLJ 119 ***(cit)***
Wong Yial Long & Anor. v. PP [1955] MLJ 132 ***(cit)***
May v. O'Sullivan [1954-55] 92 CLR 654 ***(cit)***
Manson v. Duke of Westminster [1981] 2 AER 40 ***(cit)***
Meaz v. The Queen [1955] 93 CLR 493 ***(cit)***
Flower v. Ebbw Vale Steel, Iron & Coal Co. [1934] 2 KB 132 ***(cit)***
Ng Theng Shuang v. PP [1995] 2 SLR 36 ***(cit)***
Vacher & Sons Ltd v. London Society of Compositors [1913] AC 107 ***(cit)***
Artemiou v. Procopiou [1966] 1 QB 878 ***(cit)***

Held:

Per Edgar Joseph Jr FCJ (majority decision):

[1] The expression 'a *prima facie* case' is not found anywhere in the CPC; it is a phrase that suffers from the defect of not being self-explanatory. Nevertheless, the expression has been regularly used in the Courts, often for brevity and convenience, to denote a case 'which if unrebutted would warrant a conviction.'

[2] It is wrong in law to equate 'a *prima facie* case' (which is a question of law) with a 'beyond all reasonable doubt' case (which is a question of fact). The standard of proof of a *prima facie* case is rooted on the 'supposition that the accused may be guilty.' If the onus on the prosecution at the close of its case is to establish a *prima facie* case, then the test to be applied is a 'minimal evaluation of the prosecution's evidence to ensure that it is not inherently incredible.' Whereas, if it is to establish a 'beyond all reasonable doubt' case, then the test to be

applied is a 'maximum evaluation of the prosecution's evidence, which is a more rigorous test of credibility, to determine whether the prosecution has proven its case beyond all reasonable doubt if no more evidence is adduced'. Clearly, therefore, there is a world of difference between applying the *prima facie* test and applying the 'beyond all reasonable doubt' test.

[3] It would be highly artificial, pedantic, and invidious to require a Judge sitting alone, deciding both questions of law and fact, to suspend his judgment and confine himself to considering the 'hypothetical question' whether there is evidence on which a 'hypothetical jury' might or could convict, although he himself does not believe the prosecution's evidence.

[4] There is a sharp contrast in language between the statutory formulae under s. 180 and s. 214(2) of the CPC in respect of the standard of proof required of the prosecution at the close of its case. Section 214(2) of the CPC is a statutory enunciation of what has always been the common law of England as propounded by Lord Diplock in *Haw Tua Tau v. PP*, ie, the *prima facie* test. This *prima facie* test is applied by trial Judges in jury trials in England to determine whether, at the conclusion of the prosecution, there is a case to answer; and, it could be readily applied in jury trials in Malaya as s. 214(2) of the CPC recognised the dichotomy in the functions of the Judge and the jury. Thus, in jury trials, questions on the legal sufficiency (the *prima facie* test) of the evidence at the close of the prosecution are for the Judge, while questions on the quality and reliability of the evidence at the conclusion of the defence are for the jury.

[5] The contrasting language of the statutory formulae in s. 180 and s. 214(2) of the CPC signifies that the legislature intended to require different standards of proof from the prosecution at the close of its case, depending on whether the trial is a jury-trial or a non-jury trial; the general rule of construction being that a deliberate change of expression denotes a change in meaning. The statutory formula in s. 180 of the CPC is apt to describe the 'beyond all reasonable doubt' standard of proof whilst the statutory formulas in s. 214(2) and (3) are apt to describe a lower standard of proof, ie, the *prima facie* case or supposition that the accused may be guilty.

[6] The aforesaid principles applicable to jury trials in England, at the close of the case for the prosecution, should not apply to trials in the High Court before a Judge sitting alone, in Malaysia, which are governed exclusively by s. 180 of the CPC.

[7] *Haw Tua Tau v. PP* had erred in treating the phrase 'if unrebutted' (which conveys a negative concept), as if it meant 'if it were to be accepted as accurate' (which conveys a positive concept). The phrase 'if unrebutted' in s. 180 of the CPC means 'if uncontradicted,' or 'if unexplained,' or 'if unrefuted' – by rebuttal evidence or counter proof or opposing testimony to be adduced by the defence. In the context of s. 180 of the CPC, rebuttal evidence can only have reference to the evidence to be adduced by the defence, if any. The word 'if' imports a condition precedent or imposes a contingency on the fulfilment of which the legal consequences therein, laid down, to wit, 'would warrant a conviction,' must follow. In practical terms, the effect of the phrase 'if unrebutted would warrant a conviction' is that the Judge is bound, at the conclusion of the case for the prosecution, to decide definitely, which, if either, of two possible but incompatible versions of the facts have been proved; he must decide, at that very stage, whether the prosecution's witnesses are telling the truth. This is not a hypothetical question of law but an actual and real question of fact.

[8] Furthermore, *Haw Tua Tau v. PP* had, in its express reliance on English jury-trial principles, treated the phrase 'would warrant a conviction' as meaning no more than 'could or might warrant a conviction' – thus drastically rewriting s. 180 of the CPC.

[9] The 'beyond all reasonable doubt' standard of proof, when applied to the prosecution's evidence at the close of its case, subjects it to a more rigorous test of credibility, as compared to the *prima facie* test. The *prima facie* test might enable an initially weak prosecution case to gain strength from the evidence of the defence; its deficiencies might be repaired through the cross-examination of the accused or his witnesses. Thus, the 'beyond all reasonable doubt' standard of proof is predominantly more favourable and advantageous to the accused; the higher the standard of proof required of the prosecution to establish its case the greater the protection offered to the accused.

[10] The *ratio decidendi* of the unanimous decision of the Supreme Court (five-member panel) in *Khoo Hi Chiang v. PP* was: that the standard of proof required of the prosecution at the close of its case, in a non-jury trial in Malaysia is, having regard to s. 180 of the CPC, the usual criminal standard of proof, to wit, the 'beyond all reasonable doubt' standard; and that this 'beyond all reasonable doubt' standard of proof, which calls for a maximum evaluation of the evidence tendered by the prosecution, ie, a more vigorous test of credibility, is to be applied instead of the *prima facie* test which calls for a minimum evaluation – thereby overruling *Haw Tua Tau v. PP* on that point. The Federal Court in *Tan*

Boon Kean v. PP had misunderstood this, and the decision should not be followed in respect of the standard of proof required of the prosecution at the end of its case in a non-jury trial.

[11] The prosecution 'makes out a case' against the accused by adducing evidence of primary facts; and it is to such evidence that the words 'if unrebutted' must refer. Thus, 'to make out a case' must mean 'to make out a case having regard to the degree of proof demanded by the law' – which, by s. 180 of the CPC, means a case which 'if unrebutted would warrant a conviction,' not 'if it were to be accepted as true or if believed could or might warrant a conviction.' Evidence which would warrant a conviction, if unrebutted, is evidence that satisfies the Court beyond all reasonable doubt that the accused is guilty.

[12] The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury. To qualify as a *ratio* a ruling must be made on a disputed point of law. Consequently, unnecessary rulings make no precedents, and it is the Judge, not the parties, who decides what is a necessary ruling. In this context, it is of decisive importance to note that in *Haw Tua Tau v. PP*, Lord Diplock did not treat his ruling on the standard of proof required of the prosecution at the close of its case as a necessary step towards his conclusion on the sole question which arose for decision before the Privy Council, ie, whether the impugned amendments to the Criminal Procedure Code of Singapore were inconsistent with the Constitution of Singapore. Hence, the said ruling should be regarded as *obiter dicta*.

[13] Ultimately, in a criminal trial held in Malaysia, before a Judge sitting alone who is Judge of fact and law, at the close of the case for the prosecution, the test to be applied in determining whether there is a case to answer, having regard to the statutory formula in s. 180 of the CPC, is not whether the prosecution's evidence could be believed, which is a question of law, but, whether the prosecution's evidence is believed, which is a question of fact. Accordingly, *Ragunathan v. PP*, *Munusamy v. PP*, *Junaidi bin Abdullah v. PP*, and *Tan Boon Kean v. PP* were overruled; *Haw Tua Tau v. PP*, *Ng Theng Shuang v. PP*, and *Yeo Tse Soon v. PP* not followed; and *Khoo Hi Chiang v. PP* affirmed.

[14] The principle that litigants as well as the appellate Court are entitled to complete and accurate copies of the record of appeal is of such fundamental importance that it hardly needs emphasis.

Cases referred to:

Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(ovrd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(ovrd)***
Ragunathan v. PP [1982] 1 MLJ 139 ***(ovrd)***
Junaidi bin Abdullah v. PP [1993] 4 CLJ 201 ***(ovrd)***
Haw Tua Tau v. PP [1982] AC 136; [1981] 2 MLJ 49 ***(not foll)***
Yeo Tse Soon v. PP [1995] 2 CLJ 179 ***(not foll)***
Ng Theng Shuang v. PP [1995] 2 SLR 36 ***(not foll)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 ***(aff)***
PP v. Fong Ah Tong & Anor. [1940] MLJ Rep. 190 ***(foll)***
PP v. Lim Teong Seng & Ors. [1946] 12 MLJ 108 ***(foll)***
Soo Sing & Ors. v. PP [1951] MLJ 143 ***(foll)***
Ong Kiang Kek v. PP [1970] 2 MLJ 283 ***(foll)***
Mohamed Kassim v. R [1956] MLJ 212 ***(foll)***
PP v. Annuar bin Ali [1948] MLJ 38 ***(foll)***
PP v. Lee Ee Teong [1953] MLJ 244 ***(foll)***
Mohamed Yatim bin Abu Bakar [1950] MLJ 57 ***(foll)***
Pavone v. PP [1984] 1 MLJ 77 ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 ***(refd)***
PP v. Man bin Abas [1939] 1 MC 160 ***(refd)***
PP v. Lee Yee Heng [1938] MLJ 117 ***(refd)***
V Daniel v. PP [1956] MLJ 186 ***(refd)***
Hoh Keh Peng v. PP [1948] 14 MLJ 3 ***(foll)***
Karam Singh v. PP [1967] 2 MLJ 25 ***(refd)***
May v. O'Sullivan [1955] 92 CLR 654 ***(refd)***
Muniandy & Ors. v. PP [1966] 1 MLJ 257 ***(refd)***
Bridges v. North Lond Rly [1874] LR 7 HL 213 ***(refd)***
R v. Galbraith 73 Cr App R 124 ***(refd)***
Considine v. Lemmer [1971] SASR 39 ***(refd)***
Zanetti v. Hill [1962] 108 CLR 433 ***(refd)***
PP v. Balasubramaniam [1948] 14 MLJ 119 ***(refd)***
R v. Koh Soon Poh [1935] MLJ 120 ***(refd)***
Woolmington v. DPP [1935] AC 462 ***(refd)***
Mahinder Singh v. PP [1967] 1 MLJ 126 ***(refd)***
Khoo Sit Hoe & Ors. v. Lim Thean Tong [1912] AC 323 ***(refd)***
Watt Or Thomas v. Thomas [1947] AC 488 ***(refd)***
Beamish v. Beamish [1861] 9 HLC 274 ***(refd)***
A-G v. Dean and Cannons of Windsor [1860] 8 HLC 369 ***(refd)***
Jacobs v. London County Council [1950] AC 361 ***(refd)***
PP v. Omar Lopez [1967] 2 MLJ 281 ***(cit)***
Ricket v. Metropolitan Railway Co [1967] 2 HL 175 ***(cit)***
Williams v. R [1982] WAR 277 ***(cit)***
Nicholas v. Penny [1950] 2 All ER 91 ***(refd)***

Held:

Per Mohamed Dzaiddin FCJ (dissenting):

[1] The primary question of law that arose for determination was: What is the standard of proof required from the prosecution under s. 180 of the CPC? Whether a case 'which if unrebutted would warrant his conviction' means a 'beyond reasonable doubt' case or a *prima facie* case? The answer is that it is a *prima facie* case, in the sense that there is some evidence, not inherently incredible, which constitutes a *prima facie* case.

[2] The observation of Karthigesu JA in *Ng Theng Shuang v. PP* (Court of Appeal, Singapore), ie, that the Supreme Court in *Khoo Hi Chiang v. PP* had laid emphasis on the words 'would warrant a conviction' and ignored the words 'if unrebutted', was well-founded. The crucial words in s. 180 of the CPC are 'if unrebutted'.

[3] Section 180 of the CPC calls for a two-stage process in a criminal trial, which, can only be achieved if a 'minimum evaluation' of the evidence is made at the close of the prosecution's case. This, necessarily, makes the question that the Court has to ask itself at the close of the prosecution's case a purely hypothetical one. Common sense also suggests that that this two-stage process in criminal trials is in accord with our adversarial system of fair trial.

[4] It has now been shown that the principle enunciated by Lord Diplock in *Haw Tua Tau v. PP* was the ratio decidendi of the decision. (See article by Ruben J – *Standard of Proof Relating to Sufficiency of Evidence at Criminal Trials: Mental Gymnastics Since Haw Tua Tau*).

[5] The JC had arrived at the correct conclusion, ie, that there was some evidence, not inherently incredible, which constituted a *prima facie* case within the sphere of the *Haw Tua Tau* test against the appellant. However, upon a consideration of the evidence as a whole, the appellant had created a reasonable doubt in respect of the issue of possession.

[6] It is not uncommon for Judges, for good or better reasons, to change their minds or views on certain legal issues. This is judicial creativity, a function which the Judges perform in the development of the law. The law must not be seen to be static.

Cases referred to:
Haw Tua Tau v. PP [1982] AC 136 ***(foll)***
Ragunathan v. Pendakwa Raya [1982] 1 MLJ 139 ***(foll)***

Munusamy v. PP [1987] 1 MLJ 492 ***(foll)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 ***(refd)***
Ong Kiang Kek v. PP [1970] 2 MLJ 283 ***(refd)***
Junaidi bin Abdullah v. PP [1993] 4 CLJ 201 ***(cit)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
Ng Theng Shuang v. PP [1995] 2 SLR 36 ***(foll)***
Sim Ah Cheok v. PP [1991] 2 MLJ 353 ***(refd)***
PP v. Gan Lim Soon [1993] 3 SLR 261 ***(foll)***
PP v. Wong Wai Hung [1993] 1 SLR 927 ***(cit)***

Held:

Per Wan Adnan FCJ (majority decision):

[1] This appeal called for an interpretation of s. 180 of the CPC. Under this section, the prosecution is obliged to make out against the accused a case, which 'if unrebutted would warrant his conviction', before he could be called upon by the Court to enter on his defence.

[2] The phrase 'if unrebutted would warrant his conviction' describes the very type or nature of the case that the prosecution is obliged to make out against the accused before he could be called on to enter his defence. It is the type of case which would warrant his conviction if he did not tender any evidence in rebuttal at all. And since the Court can only convict an accused if it is satisfied as to his guilt beyond all reasonable doubt, it therefore follows, that before the Court can call upon an accused to enter his defence, it must be satisfied that the prosecution has made out a case against him beyond all reasonable doubt.

[3] Before the trial Court can call upon the accused to enter his defence, it must, at the close of the prosecution's case, be satisfied that each and every ingredient of the charge has been proven beyond all reasonable doubt.

[4] However, it does not mean that the Court, in calling upon an accused to enter his defence, has already made a finding on his guilt. This is only the first stage of the trial, whereupon, the Court finds every ingredient of the charge to have been proven beyond all reasonable doubt, but, will only convict the accused if he tenders no evidence in rebuttal at all.

[5] The second stage of the trial comes after the accused has been called upon to enter on his defence. The accused can either rebut the prosecution's evidence or raise a reasonable doubt as to the truth of the prosecution's case. At the close of the defence's case, it is the duty of the Court to consider the defence's evidence in the light of the

prosecution's evidence. The Court must consider the case as a whole, and then and only then, can it make a finding on the guilt of the accused. This is in line with s. 183 of the CPC.

Cases referred to:
PP v. Man bin Abas [1939] 1 MC 160 ***(cit)***
PP v. Lim Teong Seng & 2 Ors. [1946] 12 MLJ 108 ***(cit)***

[Appeal allowed, conviction quashed, death sentence set aside, and appellant acquitted and discharged]

Legislation referred to:
Constitution of Singapore, arts. 4, 9(1)
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code (Amendment) Act 1976 [Sing], s. 195
Criminal Procedure Code (Cap. 6), ss. 173(f), (h), 180, 183, 190, 214, 214(2), (3)
Sarawak Criminal Procedure Code (Cap. 58), s. 163
Criminal Procedure Code [Sing], ss. 177C, 188(1), 189(1)
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), 39B(2)
Evidence Act 1950, s. 114B

Other sources referred to:
The Insufficiency of Evidence to Raise a Case to Answer, Glass J, (1981) 55 ALJ 842, p. 845
Archbold on Criminal Pleading, Evidence & Practice, 1993 Edn., para. 4-307, p. 1/564
Lord Parker's Practice Note [1962] 1 All ER 488
American Words and Phrases, (Permanent Edition), West Publishing Co., Vol. 46, p. 365
Black's Law Dictionary, 6th Edn.
Jowitt's Dictionary of English Law, 2nd Edn., p. 1,422
Blackstone's Criminal Practice (1993), p. 1,774, para F3.13
Precedent in English Law, Cross, 4th Edn., p. 72
Precedent in Law, Laurence Goldstein, p. 180
Mozley and Whiteley's Law Dictionary, 5th Edn.
Standard of Proof Relating to Sufficiency of Evidence at Criminal Trials: Mental Gymnastics Since Haw Tua Tau, MPH Rubin J, [1996] 2 CLJ lxiv
Sarkar On Evidence, p. 45
Haw Tua Tau v. PP - Duty of Court at End of Prosecution Case - Must We Follow the Privy Council?, Prof. Tan Sri Ahmad Ibrahim, [1981] 1 JMCL 223

[Appeal from High Court Malaya, Pulau Pinang; Criminal Case No: 47(58)-18-87]

For the appellant - Karpal Singh (Manjit Singh, M. Manoharan & Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the respondent - Zaitun Zawiyah Puteh DPP (Mohd. Yusof Zainal Abidin, Azhar Mohamed & Stanley C. Augustine with her); Attorney-General's Chambers

JUDGMENT

Eusoff Chin CJ:

I have studied the grounds of judgment written by both my learned brothers Tan Sri Mohd. Azmi FCJ and Tan Sri Edgar Joseph Jr. FCJ. I agree with and fully support the judgment written by Tan Sri Edgar Joseph Jr. FCJ, and its reasonings.

The crux of the arguments before us is centred on the interpretation of s. 180 of the Criminal Procedure Code which states:

> 180. Procedure after conclusion of case for prosecution — When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out **which if unrebutted would warrant his conviction** shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

The burden is on the prosecution to prove every ingredient which constitutes the offence with which the accused is charged. When, at the close of the case for the prosecution, every ingredient is proved, then there is a **case** for the accused to answer.

When the case for the prosecution is concluded it is the duty of the Court to scrutinise and evaluate the evidence and to decide whether or not there is a case for the accused to answer. If there is no case to answer, the Court will acquit and discharge the accused person. If there is a case to answer, then the Court will call in the accused to enter on his defence. When calling the accused to enter on his defence, three alternatives are open to the accused by which he can rebut the case for the prosecution. These must be explained to the accused, and they are: (i) he can give evidence on oath from the witness box and be subject to cross-examination, or (ii) he can give an unsworn statement from the dock, or (iii) he can remain silent. Whatever alternative he elects, he is at liberty to call his witness or witnesses to testify on his behalf.

Assuming that the accused person elects to remain silent and does not wish to call any witness or produce any document for his defence then he will have failed to rebut the evidence adduced by the prosecution and the Court must be prepared, there and then, to convict the accused person of the offence charged. This is the **requirement** of s. 180 of the Criminal Procedure Code.

The question of major importance before the Court is: What is the standard of proof required of the prosecution at the close of its case having regard to the provisions of s. 180 of the Criminal Procedure Code? Is it proof beyond reasonable doubt, or is it a mere *prima facie* supposition that the accused person may be guilty of the offence charged.

It is trite law that the *onus* is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, i.e. at the close of the prosecution. My interpretation of s. 180 of the Criminal Procedure Code leads to the same conclusion as appears in the judgment of Tan Sri Edgar Joseph Jr., that is, the standard of proof required on the prosecution at all stages of the hearing is one of beyond reasonable doubt.

I therefore agree that the appeal should be allowed, the conviction quashed, and the sentence of death be set aside. The accused is acquitted and discharged.

Lamin PCA:

I have had the opportunity of reading the draft judgments of my brother Judges Mohd. Azmi FCJ and Edgar Joseph Jr. FCJ.

I do not propose to get into an involved discussion on the standard of proof required in our criminal law or on the distinction between the ***"prima facie* case"** and **"beyond reasonable doubt case"** because it has been exhaustively undertaken by them with astounding efficacy. However I wish to say a few words on them before I make my preference for either of the two judgments. The expression ***"prima facie* case"** as we all know is not found in our law but it has been regularly used perhaps, as my brother Judge, Edgar Joseph Jr. FCJ says for **"brevity and convenience"**. I agree but I think it was imported in the early days by those learned in the English criminal law. What does ***"prima facie"*** mean? It simply means **"at first sight"** or **"on the face of it"**: *Zowitt's Dictionary of English Law* (2nd. Edn. p. 1422). So the words ***"prima facie* case"** would suggest that the case when viewed on the face of it. I am not quite sure what that means. But Gordon-Smith Ag. JA in *PP v. Chin Yoke* [1940] MLJ 47 @ 48 said:

> In *Mozley and Whiteley's Law Dictionary* (5th Edn.) it states:
>
> > A litigating party is said to have a ***prima facie*** case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A ***prima facie*** case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> This follows very closely the actual wording of the sections ... .
>
> (The word **"sections"** refers to ss. 173(f), 180 and 190 CPC.)

By that the learned Judge appeared to have equated it with our law in that if at the end of the case for the prosecution the Court **"finds that no case**

against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal". Our s. 180 continues thus **"or if it does not so find, shall call on the accused to enter on his defence"**. In other words if the Court **"finds"** that a case against the accused **"has been made out which if unrebutted would warrant his conviction"** it shall call on the accused to enter on his defence. Gordon-Smith Ag. JA has said that the statement in *Mozley and Whiteley's Law Dictionary* as quoted above **"follows very closely the actual wording of the sections"** (meaning ss. 173(f), 180 and 190 CPC) then the ***"prima facie* case"** must be established by that standard of proof as is required by the Court when it **"finds"** that **"a case or no case" "has been made out which if unrebutted would warrant his conviction"** about which *Blackstone's Criminal Practice* [1993] at p. 1774 para. F3.13 states:

> The standard required of the prosecution before the tribunal of fact can find the accused guilty as **proof beyond reasonable doubt.**

and at para. F3.14 it states:

> It is the duty of the Judge in the summing-up to make it clear to the jury what standard of proof the prosecution are required to meet ... .

and cites Fanton Atkinson LJ in the case of *Allan* [1969] 1 WLR 33 at p. 36 who said that **"the *onus* is all the time on the prosecution"**. If the *onus* is all the time on the prosecution then the standard of proof required of the prosecution to prove their case for the purpose of deciding whether to call the accused to enter his defence must be proof **"beyond reasonable doubt"** and it cannot be any less. In the case of *Hornal v. Neuberger Products Ltd.* [1957] 1 QB 247 @ 263 Hadson LJ in his judgment said:

> Students are familiar with Professor Kenny's *Outlines of Criminal Law* (16th Edn. 1952, where the following passage appears at p. 416:
>
> > A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a preponderance of evidence in favour of the successful party, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt'. When therefore the **case for the prosecution is closed** after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is a reasonable doubt as to the guilt of the accused.

and his Lordship continued by repeating the words of Denning LJ in *Bater v. Bater* [1951] P. 35, 36, 37 thus:

> Denning LJ referred both to criminal and civil cases when he expressed the same idea in *Bater v. Bater:* "The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. **In criminal cases the charge must be proved beyond reasonable doubt**, but there may be degrees of proof within that standard.

and for himself he said:

> Nevertheless, on the general question of the standard of proof in criminal and civil cases, I would like to express my complete concurrence with the words used by Denning LJ in the passage I have cited.

Even the expression **"beyond reasonable doubt"** as being the standard of proof required of the prosecution is also not written into our Criminal Procedure Code. What is written into the said Code is **"has been made out which if unrebutted would warrant his conviction."** But Gordon-Smith Ag. JA in *Chin Yoke* expressed it differently thus (at p. 487):

> If however, on the other hand, after weighing up such evidence **for the prosecution** one is satisfied that it would be **wholly unsafe to convict** upon such evidence **standing alone,** no *prima facie* case has been made out and the accused should not be called on for his defence.

To translate his Lordship's words in correspondence with those in s. 180, for myself I would say that what he had in mind was that on weighing the evidence at the end of the prosecution case and upon such evidence **standing alone** meaning **"if unrebutted"**, it would be **wholly unsafe to convict upon such evidence** meaning **"no case has been made out if unrebutted it would warrant his conviction"** (and that would amount to no *prima facie* case has been made out) and the accused should not be called to enter his defence. Section 180 stipulates that there is only one standard of proof throughout the prosecution case.

Conversely that must mean that at that stage i.e. at the close of the prosecution case if it would be safe to convict on the evidence for the prosecution then and only then the accused would be called to enter his defence. This answers the second limb of s. 180. This means that the prosecution has to prove every ingredient of the charge and at the end of the case for the prosecution the Court shall then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call or not to call the accused to enter his defence. Puan Zaitun Zawiyah in her written submission seems to say that the words **"made out"** found in s. 180 CPC do not mean "**proved**" for as therein stated thus **"if a case against him has been made out (and not**

proved).” This can be misleading because the prosecution has to prove its case beyond reasonable doubt. If at the end of the case for the prosecution the accused is called upon to enter his defence and he opts to remain silent then he shall be found guilty forthwith. So for the Court to decide to call the accused to enter his defence, there must be the kind of evidence before it upon which it is entitled to make up its mind that the accused has committed the offence and to find him guilty forthwith if no evidence from the accused is forthcoming. That is the kind of evidence that must be available before the Court at the close of the prosecution case. That suggests that it requires the Court, if I may borrow the expression in *Khoo Hi Chiang*, to undertake a maximum evaluation of the evidence.

Having said all that, what I need do, with respect, is to express my support for the final draft judgment of my brother Judge Edgar Joseph Jr. FCJ on the question of the standard of proof required of the prosecution to prove its case.

On the merits of the appeal, I also concur with his finding with the result that the appeal must be allowed and accordingly the conviction is quashed, the sentence of death is set aside and the appellant is acquitted and discharged.

Mohd Azmi FCJ:

The appellant in this case was charged and convicted on 11 December 1992 for trafficking in 1396.7 grammes of cannabis, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952. He was sentenced to death. The main ground of appeal is that “The learned trial Judge seriously misdirected himself in law in relying on the principle in *Haw Tua Tau, Ragunathan* and *Munusamy*” when calling for the appellant to enter his defence.

This appeal has been specially fixed to consider the nature of the burden or *onus* of proof under s. 180 Criminal Procedure Code which is currently not free from difficulty as a result of *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 and *Tan Boon Kean v. PP* [1995] 3 MLJ 514. Section 180 provides:

> When the case for the prosecution is concluded the Court, **if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction** shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence. (Emphasis added)

Consequently, the main issue of law for determination in this appeal is:

> What is a case ‘which if unrebutted would warrant a conviction’ - is it a beyond reasonable doubt case or a *prima facie* case?

Khoo Hi Chiang purported to hold that it was a beyond reasonable doubt case on the guilt of the accused. The answer to this question of law is of

vital importance as it would determine whether the learned Judicial Commissioner in the Court below ought to have acquitted the appellant at the close of case for the prosecution instead of calling him to enter his defence.

The conclusion in *Khoo Hi Chiang* at page 290 was an issue in *Tan Boon Kean.* The crucial passage reads:

> Consequently, **the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence** tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible - The *Haw Tua Tau* test - **but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.** (Emphasis supplied)

It is a double-barrel decision. The first part lays down the duty of the Court at the close of the case for the prosecution to undertake, not a minimal evaluation but a maximum evaluation of the evidence. Whilst the second part tells us that the object of such maximum evaluation is to **determine whether or not the prosecution has established *the charge* against the accused beyond all reasonable doubt.**

In our judicial system, it is without doubt essential that the principle of *stare decisis* should be strictly applied. But where the ruling of the previous Court of superior or concurrent jurisdiction is not clear or is made *per incuriam,* a later Court is enticed to depart from it. Thus, in *Great Western Railway Company v. Owners of S.S. Mostyn* [1928] AC 57, Viscount Dunedin held that if it is not clear what the *ratio decidendi* was, then it is not part of the later tribunal's duty to spell out with great difficulty a *ratio decidenci* in order to be bound by it. The reason for this is clear enough for "No guidance is more misleading than an *obiter dictum*" per Raja Azlan FJ in *Non-Metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks Sdn. Bhd.* [1976] 2 MLJ 67 @ 68 para. G.

In *Tan Boon Kean,* the Court had no difficulty in recognizing the first limb of the decision as one on *quantum* or sufficiency of proof as the *ratio decidendi* of *Khoo Hi Chiang,* but did not follow the suggestion by the appellant to treat the second part of the judgment as having changed the burden of proof under s. 180 from a *prima facie* case to a beyond reasonable doubt case that the accused is guilty. Based on the reasoning of the Supreme Court, the Federal Court in *Tan Boon Kean* found considerable difficulty in accepting the pronouncement as purporting to abolish the two-tier stage of criminal trial by a single Judge, hitherto recognised and embedded in our adversarial justice system, and it concluded that such suggestion (if any) in the pronouncement requiring the Court to make a finding on a beyond reasonable doubt basis on the guilt of the accused at that particular stage of the trial was *obiter dicta.*

Tan Boon Kean further held that the object of the maximum evaluation of the evidence by the Court at the close of prosecution case was to determine whether the prosecution had made out a *prima facie* case before the Court could call the accused to enter his defence, and the question **whether the accused was guilty of the charge beyond reasonable doubt** should be postponed until the conclusion of the whole trial.

In her written submission, Puan Zaitun Zawiyah, for the Public Prosecutor, rejected the interpretation of s. 180 as imposing a duty on the Court to determine the guilt of the accused. Firstly, she argued that:

> It is of utmost importance to remember that at the conclusion of the prosecution case as provided in s. 180 CPC, it is neither the function nor the duty of Court to decide as to the guilt or otherwise of the accused. The question whether the accused is found guilty must and should only be decided at the conclusion of the whole trial as provided for in s. 183(1) and (2) CPC.

Secondly, she submitted that:

> At the close of the prosecution case the duty of the Court is to decide whether a case has been made out against the accused person and not to decide on his guilt, i.e. to determine whether or not all the legal ingredients of the charge preferred against the accused has been established/complied with.
>
> If the ingredients have been so proved by credible evidence then a case has been made out based upon which the accused person could, on the evidence standing alone, lawfully be convicted.
>
> But the decision as to whether or not he is guilty of such charge and whether or not he should be convicted for it is to be postponed until the Court goes through the motion of calling the accused to answer the charge (to enter his defence).
>
> Only when he offers no evidence or the evidence in his defence fails to raise any reasonable doubt against the prosecution case that Court could legally make a finding as to his guilt and if so found to automatically convict him.
>
> In short the finding of guilt must only be made at the conclusion of the trial and it is based on this finding that he should be convicted. Mohamed Azmi SCJ in *Munusamy v. PP* [1987] 1 MLJ at p. 497 para. C to H (right hand) had occasion to make observations on this very point in the following terms:
>
> > It is obvious that there is nothing in *Haw Tua Tau* case to suggest that the "*prima facie* case" approach as understood in criminal trials in this country and enunciated in *Public Prosecutor v. Chin Yoke*, is wrong in principle. On the contrary, in overruling the various passages in *Ong Kiang Kek* on the effect of s. 188(1) (formerly s. 177C) it re-establishes once and for all that there is no duty cast on the prosecution to actually

prove their case beyond reasonable doubt as to guilt of the accused at the close of case for the prosecution. There is accordingly no rejection of the **'established beyond reasonable doubt'** test, provided it is applied at that stage of the trial in the hypothetical form. Thus, under s. 180, the Judge must ask himself on the basis of credible evidence, a mere hypothetical question: **"If I were to accept the prosecution's evidence as accurate, would it establish the case against the accused beyond a reasonable doubt?"** Putting it in the '*prima facie* case' form: **On the assumption that the prosecution's evidence was accurate, could the accused be lawfully convicted?"** If the answer on either question is in the affirmative, then a case is said to have been made out which, if unrebutted, would warrant a conviction, and in such a case the accused should be called upon to state his defence. It must necessarily follow that if the accused elected to remain silent and called no evidence the Court must convict him since the hypothetical position obtained pursuant to s. 180 that the prosecution evidence would not and could not be rebutted, has become a reality (see *PP v. Man bin Abas*)

In *Tan Boon Kean v. PP* [1995] 3 MLJ 514, at 532 C to E, in elaborating on this very point Mohamed Azmi FCJ said:

From the case of *Mah Kok Cheong* and other local authorities, there is clearly no legal requirement for the Court to decide on the guilt of the accused at the close of the prosecution. Only the test under s. 180 needs to be applied. If the accused elects to remain silent and call no evidence after defence is called, then at the conclusion of the trial, there is a duty on the part of the Court to consider the evidence as a whole as a separate exercise on the guilt of the accused on the beyond reasonable doubt test, i.e **'Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt?'**

We are not persuaded by Mr. Karpal Singh's argument that the learned Judicial Commissioner in this appeal has erred in law for failing to comply with the *ratio* in *Khoo Hi Chiang.* In our view there is no definitive ruling in *Khoo Hi Chiang* that the word 'case' in s. 180 is not a *prima facie* case.

However in her concluding paras. 6 and 7 of her written submission, the learned DPP was begging the question posed by the Court. In her apparent attempt to avoid an unpleasant task, she stated that there was no necessity for the Court to describe the case as **"beyond reasonable doubt case or a *prima facie* case or any other type of case"**. According to her the Court need only follow the wording of s. 180. But this is precisely the point - the meaning of the words used in s. 180 are now in question and this Court must attempt to interpret them as best as it could. It must be observed that for the purpose of our CPC, and in the context of the two-tier approach of criminal trials before a single Judge, a *prima facie* case under s. 180 is not the same

as a beyond reasonable doubt case on the guilt of the accused under s. 183. As correctly pointed out by the learned DPP, it is neither the function nor the duty of the Court under s. 180, to decide as to the guilt or otherwise of the accused.

For reasons stated in *Tan Boon Kean* and *Munusamy*, I have no ground to change my mind that *Khoo Hi Chiang* has not succeeded in abolishing (if indeed that was the intention of the judgment) the *prima facie* test under s. 180, for to replace it with the **"guilty beyond reasonable doubt test"** the Supreme Court must surely discuss which it did not, how such a drastic legal proposition could be reconciled with the cardinal principle of criminal law that the general burden of proof on the guilt of the accused is always on the prosecution throughout the whole trial and that it never shifts. Nor is there any explanation how such a proposition could satisfy another cardinal principle of criminal law on the presumption of innocence hitherto enjoyed by the accused which is so essential as an ingredient of a fair trial in our adversarial system of criminal justice. The Supreme Court was also silent on how the new pronouncement would surmount the two-tier structure of our criminal trials, as contained in ss. 180 and 183 CPC and as so interpreted by our Courts (See *Mah Kok Cheong v. R* [1953] MLJ 46). Notwithstanding Singapore's case of *Ong Kiang Kek v. PP* [1970] 2 MLJ 283 and other lesser known High Court cases decided locally, s. 180 has been consistently interpreted by our superior Courts as requiring a *prima facie* test since *PP v. Goo Kian* [1939] MLJ 291 and *Mah Kok Cheong v. R* [1953] MLJ 46, and subsequently by *Pavone v. PP* [1984] 1 MLJ 77, *Munusamy v. PP* [1987] 1 MLJ 492 and *Junaidi bin Abdullah v. PP* [1993] 3 MLJ 217. Indeed, with the greatest of respect, the nature of the "case" constituting the burden of proof in s. 180 in the form that it is now before this Court was not even posed in *Khoo Hi Chiang*, and on further reflection, I am of the humble opinion that the pronouncement in that case was made *per incuriam* as a result of the Supreme Court:

(i) substituting the word **"case"** used by the legislature in s. 180 with **"evidence"**, or treating both words as if they meant the same thing, and failure to consider s. 183, and thereby failed to distinguish the crucial difference between burden of proof and quantum of proof;

(ii) giving insignificant weight to the actual words used by the legislature in s. 180 particularly the words **"if unrebutted"**, and instead relying heavily on the difference between jury and non-jury trials to the exclusion of basic principles of interpretation of statutes;

(iii) unnecessarily relying on the Singapore's Court of Appeal case of *Ong Kiang Kek v. PP* [1970] 2 MLJ 283, which had been reversed and ceased to be followed;

(iv) misreading the judgment of the Privy Council in *Haw Tua Tau* on burden of proof as mere *obiter dicta,* and thereby failed to appreciate the paramount importance of the concept of fair trial in the adversarial system of criminal justice when interpreting s. 180.

(i) ***Can the word "case" in s. 180 be substituted with "evidence"***

In his written submission, Mr. Karpal Singh for the appellant answers the question posed by referring to the 1970 judgment of the Singapore Court of Appeal in *Ong Kiang Kek v. PP* for the interpretation of s. 180 as requiring the trial Judge to apply the beyond reasonable doubt test on the guilt of the accused. He also relies on the judgment of Laville J in *PP v. Lim Teong Seng & 2 Ors.* [1946] 12 MLJ 108 at 109. He went on to argue:

> There are 2 stages. If the case for the prosecution is proved beyond reasonable doubt at the close of its case upon a minimum evaluation of the evidence at that stage, (as held in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265) then arises the defence which can rebut (it is here that the phrase 'if unrebutted would warrant a conviction' assumes significance and import) what has been proved beyond reasonable doubt at the close of the prosecution case by raising a reasonable doubt on the prosecution case (see *Mohamed Radhi bin Yaacob v. Public Prosecutor* [1991] 3 MLJ 169.

Mr. Karpal Singh's oral and written arguments are therefore as follows:

(i) In s. 180 CPC, the word **"case"** can be substituted with **"evidence".**

(ii) Whilst recognising the two stages in criminal trial, the words **"if unrebutted would warrant a conviction"** in s. 180 refer to the second stage, during which the accused could rebut his beyond reasonable doubt guilt, i.e. after defence is called.

I shall deal with the absurdity of the second argument later under the next heading. As regards the first submission, it is sufficiently disposed off by DPP Puan Zaitun Zawiyah in her oral submission. The learned DPP correctly submitted that in order to establish a "case" under s. 180 the prosecution must adduce evidence. In my opinion, no authority is necessary to establish a clear distinction between the word "case" and that of "evidence". In *PP v. Chin Yoke* [1940] MLJ 47 at 48, Gordon-Smith Ag. JA adopted the following meaning of a *prima facie* case as judicially defined in *Mozley and Whiteley's Law Dictionary* (5th Edn.)

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer. A *prima facie* case, then, is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side.

Sarkar On Evidence at p. 45 defines "*prima facie* evidence" as **"evidence which, if accepted appears to be sufficient to establish a fact, unless rebutted by acceptable evidence to the contrary. *It is not conclusive***".

Thus, although beyond reasonable doubt evidence is required to establish a case under s. 180, because of the words **"if unrebutted"**, the Court must not treat the prosecution case as conclusive at that stage of the trial. Since the case is not conclusive, it can only be *prima facie* even if the evidence on the essential ingredients of the charge is credible and accepted by the Court. On the other hand, if the evidence on the essential ingredients of the charge are lacking or not credible, either by themselves or as a result of cross-examination, there can be no *prima facie* case and the accused is entitled to an acquittal (see *PP v. Balasubramaniam* [1948] MLJ 119, where an essential ingredient of the charge was not proved, and *Wong Yiap Long & Anor. v. PP* [1955] MLJ 132, where prosecution evidence was incomplete). Conversely, a **"beyond reasonable doubt case"** (unless it is applied on a hypothetical basis) is one which is already conclusive and would therefore be inconsistent with the words **"if unrebutted"** in s. 180. The **"case"** required to be made out by the prosecution must by the very words of the section be of a *prima facie* nature. In our two-tier structure, the beyond reasonable doubt test on the guilt of the accused must be postponed until the conclusion of the trial, as enunciated by the Privy Council and statutorily required by our s. 183 which provides:

> (1) If the Court finds the accused not guilty the Court shall record an order of acquittal.
>
> (2) If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law.

For the purpose of interpretation of s. 180 this Court must remind itself of basic principles governing the interpretation of statutes as laid down by the House of Lords and often cited by our Courts. The first can be found in the judgment of Lord Macmillan in *London and North Eastern Railway Company v. Berriman* [1946] AC 278 @ 295:

> I quote and adopt the words of Alderson B: "The rule of law, I take it, upon the construction of all statutes ... is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity." *(Attorney-General v. Lockwood* [1842] 9 M & W 378, 398.)

The second cannon of interpretation is provided by *Magor and St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189, where at p. 191 Lord Simonds said:

> ... The duty of the Court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery is strictly limited; see, for instance, *Assam Railways & Trading Co. Ltd. v. Inland Revenue Commissioners,* and particularly the observations of Lord Wright [1935] AC 458.

Finally, in *Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142, Lord Diplock warned judges against the temptation to provide their own amendments of statute under the guise of interpretation, when he said at p. 157:

> A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed;... But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts ...
>
> It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the Court before whom the matter comes consider to be injurious to the public interest.

In my view, *Khoo Hi Chiang* with the utmost respect, was misled by the erroneous way in which the nature of the onus on the prosecution was posed as contained in the submission of Counsel of the appellant before the Supreme Court, on the alleged need to tender evidence (instead of the requirement to make out a case) **"which if unrebutted would warrant a conviction"**. At p. 277, the judgment states:

> The principal points of law argued were twofold: firstly that in ruling that the appellants had a case to answer, the Judge had relied on the test laid down by Lord Diplock in *Haw Tua Tau* which requires only a minimal evaluation of the evidence at the close of the case for the prosecution to ensure that it is not inherently incredible. **It was said he was wrong in so doing as the onus on the prosecution at the close of its case was not to establish a *prima facie case,* but to tender evidence which if unrebutted, would warrant a conviction.** (see s. 180 of the Code)
>
> (Emphasis supplied)

The requirement of the prosecution to tender evidence adopted by *Khoo Hi Chiang* can be found, not in s. 180, but in s. 179. Section 180 does not say that the prosecution ***must tender or render evidence*** **"which if unrebutted**

would warrant a conviction" - the term used in *Ong Kiang Kek v. PP* [1970] 2 MLJ 283, a Singapore case which is no longer good law but unfortunately followed by *Khoo Hi Chiang.* In my opinion, the Court is not permitted to substitute the word **"case"** in s. 180 with **"evidence"**. To borrow the words used in *Khoo Hi Chiang* at p. 290, **"To do so would amount to making an unauthorised amendment to a statutory provision which touches the liberty of the subject."** Section 180 deals with burden of proof and not quantum of proof. The omission to distinguish them would seem to cause *Ong Kiang Kek* and other similar cases to travel outside the words used in the section.

Section 163 of the Sarawak Criminal Procedure Code (Cap. 58 *Laws of Sarawak 1958,* Vol. 2) affords a good illustration of the distinction between the two words. Prior to amendment by Ordinance No. 11 of 1962, the section (which contained similar hypothetical words as s. 180) provided:

> If upon taking all the evidence referred to in s. 162 and asking such questions, if any, of the accused under s. 201 as the Court considers necessary **it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction,** the Court may, subject to the provisions of s. 171, record an order of acquittal. (Emphasis supplied)

With effect from 16 July 1962, the legislature amended the word **"case"** with **"evidence"**:

> ... it finds that **no evidence has been adduced** which if believed would, warrant conviction ... (The rest of the section remains the same).

A legislative intervention is thus necessary before the word **"case"** in our s. 180 can be substituted with **"evidence"**. What *Khoo Hi Chiang* did in its interpretation of s. 180 is in my view contrary to basic principles of statutory interpretation. Since the words **"case"** is plain and unambiguous, its ordinary and literal meaning should be adopted. Substituting the word **"case"** with something else is in the words of Lord Simonds in *Magor and St. Mellons R.D.C.,* to allow the Court to usurp the function of the legislature by permitting it to travel outside the legislative word on a voyage of discovery. There is nothing absurd in the *prima facie* test interpretation of s. 180. In order to give substance to the principle of fair trial, the *prima facie* interpretation of the section has been adopted for a very long time in this country, until *Ong Kiang Kek* in 1970 and now *Khoo Hi Chiang* came into the picture. In this regard, I have no reason to change my mind from what was said in *Munusamy v. PP* that in effect there is no difference conceptually between the *prima facie* test in *Haw Tua Tau* and the other test on burden of proof, provided the trial Judge or Magistrate bears in mind that the beyond reasonable

doubt test may only be applied on the hypothetical basis at that stage of the proceedings due to the words **"if unrebutted"** in s. 180. Be that as it may, to avoid practical difficulties, particularly in the lower Courts, Judges in Malaysia should in my opinion continue to use the *prima facie* test which has served us well. To require the trial Judge to find the accused in fact and in law guilty beyond reasonable doubt under s. 180 would not only be contrary to the principle of fair trial in an adversarial system of criminal justice as stated in *Haw Tua Tau,* but also inconsistent with the requirement *of* **"if unrebutted"** in that section read with sub-ss. (1) and (2) of s. 183 CPC.

As was laid down in *Munusamy v. PP* [1987] 1 MLJ 492 @ 497:

> It is therefore wrong under ss. 173(f), 180 and 190 of the CPC for a Judge or Magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial after the defence has given evidence and close its case. In substance, that is what Gordon-Smith Ag. JA. meant when he held in 1940 in *Public Prosecutor v. Chin Yoke (ante).*

It must be emphasised that in the *prima facie* test under s. 180 the Judge must not call for the defence merely to supplement what would otherwise be a hopeless prosecution case. The question of law to be posed is a hypothetical one. The test is not whether the accused ought to be found guilty and convicted at that stage of the proceedings, but whether he should or could be convicted if the prosecution case is unrebutted at that stage of the trial. As the trial is not yet over, the learned DPP is correct in her submission that s. 180 does not impose a duty on the Court to determine the guilt of the accused on the charge preferred against him. To do so is a miscarriage of justice not only because it completely violates the cardinal principle of criminal justice that an accused person is presumed innocent throughout until proven guilty at the conclusion of the whole trial, but is also contrary to the cumulative effect of ss. 178 to 183 CPC. As such the duty of the trial Judge to determine whether the accused is guilty or not guilty must not arise in the middle of the trial, and under s. 183, such duty only arises at the conclusion of the whole trial, after the prosecution has exercised the right of reply on the whole case under s. 182. It is in the context of the principles of *audi alteram partem* and presumption of innocence that *Tan Boon Kean* observed the absurdity of deciding the guilt of the accused before the trial is over.

> ... what chance would the accused have to earn an acquittal at the conclusion of the trial if the Court were obliged to decide at the close of prosecution that he was already guilty of the charge beyond any reasonable doubt?

The maxim *audi alteram partem* is explained in *Jowitt's Dictionary of English Law* as follows:

a *Audi alteram partem; audiatur et altera pars* (hear the other side) an injunction which means that no man should be condemned unheard or without having had an opportunity of being heard. It is "an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him" (*Re Brook* [1864] 16 CB (NS) 403, 416, per Erle CJ). See *Broom* 65. It is one of the principles of natural justice (qv). See *b* also *Cooper v. Wandsworth Board of Works* [1863] 32 LJCP 185, and the reference therein, at p. 188, by Byles J, to *Bentley's Case* [1723] 1 Str. 557, and the quaint reason given by Fortescue J for the common law supplying the omission in a statute to direct a hearing: *Hopkins v. Smethwick Local Board* [1890] 24 QBD 712.

c Similarly, *Qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit* - 6 Co. Rep. 52 (taken from Seneca's *Medea).* (He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right.)

d In the circumstances, substituting the duty of the prosecution to make out a **"case"** under s. 180 with the duty to render or tender **"evidence which if unrebutted would warrant a conviction"** is wholly unjustified and wrong in law.

(ii) Can the words "if unrebutted" in s. 180 be ignored?

e On Mr. Karpal Singh's second argument, it seems obvious from the hypothetical language of s. 180 that it cannot refer to the second stage of the criminal trial, and that the words **"if unrebutted would warrant a conviction"** must relate entirely to the nature of the case to be made out by the prosecution before there can be a case to answer. As pointed out by *Tan Boon Kean* it *f* is a question of law and not of evidence.

In s. 180, the legislature did not say that the case must be one **which if unrebutted at the close of defence would warrant a conviction**. The section solely governs the prosecution, and it does not as suggested by Mr. *g* Karpal Singh impose any onus on the accused to rebut the case made out by the prosecution under that section. It is trite law that to earn an acquittal at the close of defence, the only duty on the accused under s. 183(1) is to raise a reasonable doubt as to his guilt or as to the truth of the prosecution taken in its entirety having regard to the defence. As laid down in the famous speech of Viscount Sankey LC in *Woolmington v. Director of Public Prosecutions* *h* [1935] AC 462 @ 481:

Throughout the web of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... . If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to *i*

> whether the prisoner killed the deceased ... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Thus, it is wrong for Mr. Karpal Singh in support of *Khoo Hi Chiang* to whittle down the cardinal principle of our criminal law on the presumption of innocence of the accused throughout the whole trial, by interpreting s. 180 in such a way that imposes not only a duty on the trial Judge to find the accused guilty beyond reasonable doubt prematurely at close of the prosecution case, but also to impose a heavier burden on the accused to rebut the prosecution case, when in law the defence duty is merely to raise a reasonable doubt to earn an acquittal. The *prima facie* interpretation of that section, being more consistent with the concept of fair trial under natural justice and as well as with the principles of criminal law, must be preserved as an indispensable requirement of justice.

It is also incorrect for Mr. Karpal to submit without any authority, that the two stages in criminal trial are both governed by s. 180 without any regard to s. 183 and the cardinal principles in *Woolmington.* The words **"if unrebutted etc"** merely emphasise the *prima facie* nature of the test. The cumulative effect of ss. 180 to 183 also indicates that s. 180 is not intended to govern the second stage of criminal trial. Unlike the continuing burden on the prosecution to prove the guilt of the accused from beginning to end, the burden under s. 180 ceases once defence is called. As stated earlier, it is trite law that an accused person must be presumed innocent until proven guilty, and that final determination must surely be made, not in the middle of the trial but at its conclusion which will normally occur after the defence is closed, or on the rare occasion that the accused elects to remain silent and calls no evidence. The two distinct burden of proof on the prosecution in a criminal trial is well established in *Mah Kok Cheong v. R* [1953] MLJ 46 @ 47, and re-affirmed in *Tan Boon Kean.* First, is the statutory burden under s. 180 to make out a *prima facie* case at the close of prosecution, and second is the general burden which never shifts on the guilt of the accused based on proof "beyond reasonable doubt". There is accordingly no real purpose in bringing into argument the question of quantum of proof in s. 214 for the interpretation of s. 180. The former deals with jury trial with which we are not concerned. If Mr. Karpal Singh accepted the two-stage structure of criminal trial, then he must surely accept the distinct burden at each level of the trial.

Another flaw in the reasoning of *Khoo Hi Chiang* (and repeated by Mr. Karpal Singh) is the reliance on Laville J's *obiter dicta* in *PP v. Fong Ah Tong & Cheong Chi Shen* [1940] MLJ 240 on the meaning of the word

'warrant' in s. 180 without any regard to the words **"if unrebutted".** Laville J said at page 240, **"warrant in my view is a strong word and excludes any doubt by the Court."** In addition, Laville J had in my view committed the common error of mixing up the question of burden of proof with quantum of proof for the purpose of s. 190 (which is *in pari materia* with s. 180) by treating it as "***evidence*** **which if unrebutted would warrant a conviction."** Thus, at p. 280 para. C, the judgment in *Khoo Hi Chiang* reads:

> In *PP v. Fong Ah Tong & Cheong Chi Shen* [1940] 1 MLJ 240, a murder trial before a Judge with assessors, a submission of no case to answer had been made by Counsel for the defence under s. 190 of the Code and, in the course of his ruling thereon, Laville J said this at p. 240 paras. 3 and 4:
>
> > But by s. 190 it would appear that there is an onus cast on the presiding Judge at a trial with the aid of assessors to decide at the end of the prosecution evidence, not as in jury cases whether there is any evidence at all of the guilt of the accused, to go to the jury, but a greater onus, namely whether the prosecution evidence if no evidence is given at all by accused would justify a conviction. "Warrant" in my view is a strong word and excludes any doubts by the Court.
> >
> > The evidence which would warrant a conviction, if unrebutted, is evidence that satisfies the Court beyond all reasonable doubt that the accused is guilty of the offence charged or some lesser offence. The criterion therefore on which the Court must work is, if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt.
>
> *Fong Ah Tong* appears to be the only locally reported case where the word '**warrant'** in the context of s. 190 had received judicial considerations.

Later, at p. 290, the learned Judge used this argument to show that the term **"would warrant a conviction"** does not mean **"could or might warrant a conviction"***:*

> Looking back what all this lengthy discussion comes to is whether we can treat the words 'which if unrebutted would warrant a conviction' appearing in ss. 180, 190 and 173(f) of the Code as meaning no more than 'which if unrebutted could or might warrant a conviction'.
>
> With all due respect to Lord Diplock - and we say this humbly, even without reference to the wealth of long-standing decisions by Judges in this country and in Singapore to which we have referred, and only after careful thought that we are unable to treat the words 'which if unrebutted *would* warrant a conviction' as meaning no more than 'which if unrebutted *could or might* warrant a conviction.' To do so would amount to making an unauthorised amendment to a statutory provision which touches the liberty of the subject. With the support of the long-standing decisions to which we have referred our view would be a *fortiori.*

Whilst there can be no dispute that the word **"warrant"** is a strong word it must be read in the context of **"if unrebutted"**. As indicated earlier the question of law to be asked at the close of the case for the prosecution is not whether the accused ought to be convicted, but whether he could be convicted if no further evidence is forthcoming (see *May v. O'Sullivan* [1954-55] 92 CLR 654 cited with approval in *Tan Boon Kean*). In my view, the importance of any distinction between jury and non-jury trials becomes secondary, unless the term **"if unrebutted"** is given due consideration regarding its ordinary significance for the purpose of interpretation. In this connection, it is relevant to bear in mind Lord Wensleydale's golden rule cited with approval by Lord Blackburn in *River Wear Comrs v. Adamson* [1877] 2 AC 743 @ 764-5.

> ... that we are to take the whole statute together, and construe it all together, giving the words their ordinary significance, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.

[See Stephenson LJ in *Manson v. Duke of Westminster* [1981] 2 AER 40 @ 48].

The requirement of **"if unrebutted"**, just as **"would warrant a conviction"** must be fulfilled as a matter of law by the trial Judge before and not after calling for the defence. This onus to make out a *prima facie* case under s. 180 is on the prosecution and not on the defence. As such, Mr. Karpal Singh's oral and written submission must be rejected, as it violates basic principle of interpretation of statutes in the same way that the word **"case"** (which is essentially a question of law) ought not to be treated as **"evidence"** (which is a question of fact). Further, as stated earlier on, the onus placed on the defence under s. 183 is merely to raise a reasonable doubt either as to the guilt of the accused, or as to the truth of the prosecution case taken in its totality, and there is no duty except in such limited instances like statutory presumptions, to rebut every allegation made by the prosecution. To avoid an absurd result, s. 180 should be interpreted in accordance with the basic principle of criminal law that the onus of proving beyond reasonable doubt that the accused is guilty as charged rests upon the prosecution throughout the whole trial and never shifts to the defence, but the determination as to guilt or otherwise of the accused must be postponed until the conclusion of the whole trial. The whittling down of this cardinal principle cannot be justified for whatever reason. On this ground alone the principle enunciated in *Khoo Hi Chiang* which requires the Judge to make a finding of guilt or otherwise of the accused in the middle of a trial must be rejected.

(iii) ***Is it necessary to rely on Ong Kiang Kek v. PP [1970] 2 MLJ 283***

In giving undue weight to Laville J's judgments in *PP v. Fong Ah Tong & Cheong Chi Shen* [1940] 1 MLJ 240 and *PP v. Lim Teong Seng & 2 Ors.* [1946] 12 MLJ 108, *Khoo Hi Chiang* seems to rely heavily on *Ong Kiang Kek v. PP* [1970] 2 MLJ 283 @ 284, 285 where the Singapore Court of Appeal (Wee Chong Jin CJ, Tan Ah Tah and Winslow JJ) in allowing an appeal against conviction for murder held that the trial Court was required by s. 177C CPC, at the close of the prosecution case to determine whether or not **the evidence tendered** on behalf of the prosecution, **if unrebutted, had established the *"case"* against the accused beyond a reasonable doubt**. If the Court found at that stage of the trial that it had not been so established there was nothing left but to acquit the accused. Page 284 *of Ong Kiang Kek* reads:

> In fact the law imposes a duty on the Court, whether or not a submission of no case to answer has been made, to consider at the close of the case for the prosecution whether or not a case has been made out against the accused which if unrebutted would warrant his conviction. Section 177C of the Criminal Procedure Code reads:
>
> > 177C: When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or if it does not so find, shall call on the accused to enter on his defence.
>
> Section 172 which prescribes the procedure to be observed by Magistrates' Courts and District Courts in summary trials contains a para (f) which is similar in terms to s. 177C. It is *settled law that under s. 172(f) a Magistrate's Court or a District Court is bound to acquit an accused person if, at the close of the case for the prosecution, the Court on the evidence then before it has a reasonable doubt as to the guilt of the accused of the offence charged.* The reason is because in a criminal case it is a cardinal principle that the burden is on the prosecution to prove the case against the accused beyond a reasonable doubt and accordingly **no convinction can be warranted unless at the close of the case for the prosecution the Court is left in no reasonable doubt as to the guilt of the accused.**

It is clear that the above passage in effect buried the two-tier structure of criminal trials which naturally did not find favour with the Privy Council.

The Privy Council through Lord Diplock disagreed that at that stage of the trial, s. 177C CPC (our s. 180) required the trial Judge to determine whether the accused is guilty beyond reasonable doubt. The section requires a case to be made out **"which if unrebutted would warrant a conviction"**. I find it difficult to understand why the Privy Council was wrong in holding that by

the very words of s. 180 (s. 177C Singapore) they do not require such determination. In my view any suggestion that s. 180 deals with satisfaction by the Court on the guilt of the accused on a beyond reasonable doubt basis, is itself guilty of mutilating the words used by the legislature. It is for this reason that the Privy Council held that the case of *Ong Kiang Kek* was wrongly decided, and all that s. 180 requires is for the trial Judge to ask himself a hypothetical question of law whether at the close of case for prosecution the accused could be found guilty, if the case as it stood were unrebutted. It is different from the sole question to be asked at the conclusion of the trial which is, **"Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to accused's guilt?"** (see principle laid down by Spencer Wilkinson J in *Mah Kok Cheong v. R* [1953] MLJ 46 @ 47). The requirement of a finding of guilt on a beyond reasonable doubt basis by the Court under s. 180 other than on a hypothetical basis, would indeed in the words of Lord Diplock **"runs counter to the concept of what is a fair trial"** on the adversarial system of criminal trials. The word **"case"** as correctly submitted by DPP Puan Zaitun Zawiyah must of course be established by the evidence of witnesses called by the prosecution. In the process of weighing the evidence for the purpose of establishing *a prima facie* case, the Court should not accept such evidence as credible, unless they are beyond reasonable doubt evidence, but such acceptance of evidence proving the essential ingredients of the charge, need not be conclusive on the guilt of the accused but it should only be on a hypothetical basis that no further evidence would be forthcoming, and as such the Court must keep an open mind on the question of guilt till the conclusion of the whole trial. It is therefore quite different and distinct from the process of finding the accused guilty beyond reasonable doubt at the conclusion of the trial under s. 183. These words **"which if unrebutted would warrant a conviction"** in s. 180 in effect define the very nature of the *prima facie* case required to be established by the prosecution. It is fatal to ignore the hypothetical nature of s. 180. To do so would result in misinterpretation of the law as did happen in *Ong Kiang Kek* and other similar cases, which attempted to amend the words used in the section under the guise of interpretation. With the greatest respect, *Khoo Hi Chiang* which seems to follow *Ong Kiang Kek's* adoption of Laville J judgments in the two 1940s High Court cases, also became the victim of ignoring the hypothetical nature of s. 180.

One may ask why should the principle of fair trial be so important if the decision of the Judge at the end of the day is correct on the evidence? The answer lies in the very concept of justice itself. Justice warrants not only a just decision but equally important a fair trial. A reference to the judgment of Gunn Chit Tuan J (as he then was) in *Mohamed Din v. PP* [1985] 2 MLJ 251 at 256 is relevant:

Counsel for the appellant, however, did refer me to the following passage of Fullagar J in the High Court of Australia case of *Meaz v. the Queen* [1955] 93 CLR 493, 514 concerning the meaning of the expression **'miscarriage of justice'** in s. 6(1) of the New South Wales Criminal Appeal Act of 1912:

> It is very well established that the *proviso* to s. 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

Another relevant authority is the Indian case of *Krishna Murthy v. Abdul Subban* [1965] 1 CRLJ 565, 576, where Hegde J held:

> ... In law the expression "justice" comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr.PC have primarily in view a fair trial. For the purpose of these sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

It is for this reason that DPP Mr. Stanley Augustin's last minute attempt in *Tan Boon Kean* to short circuit that appeal by indulging in plea bargaining with the appellant (a practice regarded as improper in common law jurisdiction) by offering to accept conviction on a lesser charge for possession instead of trafficking could not be entertained. This is made clear by the Federal Court at p. 520:

> ... We must stress at this stage that if the statutory test imposed by s. 180 of the Code had been wrongly applied by the learned Judicial Commissioner in calling for the appellant to enter his defence, then the conviction would certainly be wrong in law irrespective of whether the conviction is for trafficking or for mere possession of dangerous drugs under the Act.

Similarly, if the trial Court in this appeal had applied the wrong statutory test when deciding that there was a case for the appellant to meet, then there would clearly be a miscarriage of justice under the proviso to s. 60(1) of the Courts of Judicature Act 1964 on the principle laid down in *Meaz v. The*

Queen and followed in *Mohamed Din v. PP* in which event, on that ground alone the appellant would have been entitled without much ado, to succeed in his appeal. An accused person is entitled to a fair trial in which the relevant laws including the onus of proof are correctly applied by the trial Judge. "If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is in the eyes of the law, a miscarriage of justice." It would therefore be a contradiction in terms, if this Court were to conclude that the learned Judicial Commissioner was wrong in calling for the appellant to enter his defence and yet at the same time proceed to consider the defence on its merits, instead of allowing the appeal forthwith on ground of applying the wrong test, under s. 180.

In the circumstances, to interpret s. 180 as did *Khoo Hi Chiang* on the basis of beyond reasonable doubt test on the guilt of the accused **"runs counter to the concept of what is a fair trial"** under the adversarial system and is therefore wrong in law. In my view, it is absolutely essential that s. 180 be construed in accordance with the concept of fair trial under natural justice.

(iv) Is the judgment of the Privy Council in Haw Tua Tau on the burden of proof under s. 180 obiter dicta?

After commenting on the constitutional issue raised before the Judicial Committee of the Privy Council, the Supreme Court in *Khoo Hi Chiang* held at p. 286:

> It was therefore, strictly unnecessary for Lord Diplock, who spoke for the Board, to consider the effect of s. 188(1) of the Singapore Criminal Procedure Code which reads:
>
> > When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.
>
> Nevertheless his Lordship did so at some length because of certain passages in the judgment of the Court of Appeal in Singapore in *Ong Kiang Kek v. PP* which indicated quite clearly that, unless at the end of the case for the prosecution the evidence adduced has already satisfied the Judge beyond a reasonable doubt that the accused is guilty, the Judge must order his acquittal.

At p. 288, the Supreme Court (after citing *in extenso* the powerful reasoning of the Privy Council in rejecting *Ong Kiang Kek)* arrived at the following crucial conclusion:

> It would appear therefore, that the view of Lord Diplock as to the interpretation of s. 188(1) was *obiter dicta.* Certainly, apart from *Ong Kiang Kek's* case, Lord

Diplock made no mention of any of the local or Singapore cases to which we have referred, and which are to the opposite effect.

Thus, by the *obiter dicta* argument, *Khoo Hi Chiang* had unfortunately deprived itself of the opportunity to consider the very strong and sound argument of the Privy Council as to why the ruling in *Ong Kiang Kek* could not be sustained in law, it being contrary to the character of a fair criminal trial under the adversarial system, and if I may also add, contrary to the express provision of our s. 180 read with s. 183 CPC.

It should be observed that in rejecting the two-tier structure of criminal trials, Wee Chong Jin CJ in *Ong Kiang Kek* almost solely relied on Laville J in *PP v. Lim Teong Seng & Ors.* [1946] MLJ 108 (a case involving defective identification of the accused which in any event could not pass the *prima facie* test) wherein the only authority considered was his own opinion in *PP v. Fong Ah Tong & Cheong Chi Shen* [1940] 12 MLJ 240. These three authorities have not been approved by any superior appellate Court in Malaysia. The majority and better view favours retaining the two-tier approach on the strict interpretation of s. 173(f) and s. 180. Amongst the well known authorities are those laid down by Gordon-Smith Ag. JA. in *PP v. Chin Yoke* [1940] MLJ Rep 32 and Spencer Wilkinson J in *Mah Kok Cheong v. R* [1953] MLJ 46, where it was clearly explained that the duty of the Judge at the close of case for the prosecution is quite distinct from his duty at the conclusion of the trial. The final blow at Laville J's opinion was delivered by *Haw Tua Tau* which to all intents and purposes reversed the opinion of the Singapore Court of Appeal in *Ong Kiang Kek.* Indeed, in Singapore itself *Ong Kiang Kek* is no longer good law. This is also the position in Brunei (see *Yeo Tse Soon v. PP* [1995] 2 CLJ 179). The blow was repeated in Malaysia by a strong panel of the Federal Court in *A. Ragunathan v. PP* [1982] 1 MLJ 139 (Raja Azlan Ag. LP, Salleh Abbas and Abdul Hamid FJJ) and subsequently explained by *Munusamy v. PP* [1987] 1 MLJ 492 and *Junaidi bin Abdullah v. PP* [1993] 4 CLJ 201 (Mohd. Jemuri CJ(B), Mohd. Azmi and Peh Swee Chin FJJ). As *Ong Kiang Kek* is already a dead horse both here and in its country of origin, I can see no useful purpose for this Court to flog it, in the face of strong judicial opinion to the contrary including a reasoned judgment delivered by Edgar Joseph J (as he then was) in *Pavone v. PP* [1984] 1 MLJ 77 at 79 when at the close of case for the prosecution, the learned Judge opined that, **"the sole question at the close of the case for the prosecution is whether or not a prima facie case has been made out ... ."** It is interesting to note that the judgment in *Pavone* was delivered in the High Court at Penang notwithstanding the absence of any serious discussion in *Ragunathan* and without any assistance from *Munusamy* which arrived about three years later. Although nothing much should be attached to the failure of *Khoo Hi Chiang*

to consider *Pavone,* it is worthy to note that the *prima facie* test (and not the beyond reasonable doubt test on a hypothetical basis) was applied.

In any event there appears to be no justification for *Khoo Hi Chiang* to conclude that the burden of proof at the close of case for the prosecution as laid down by the Privy Council in *Haw Tua Tau* was *obiter dicta,* namely an opinion which is not necessary for the decision of the case within the principle enunciated in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* [1934] 2 KB 132 at 154. The full report of the Privy Council proceedings in *Haw Tua Tau* appearing in [1982] AC 136 at 139 (not so in MLJ), clearly shows that *Ong Kiang Kek* was very much in contention as an integral part of the constitutional issue. At p. 139, Mr. Louis Blom-Cooper Q.C. for the appellant *Haw Tua Tau, inter alia,* argued that the cumulative effect of ss. 188 to 195 CPC together with judicial interpretation of s. 188 in *Ong Kiang Kek v. PP* [1970] 2 MLJ 283 was to reverse the burden of proof. It was argued that the effect is not limited to a shift in the burden of proving particular facts. At p. 139, Counsel's submission in the alternative reads:

> *In Ong Kiang Kek v. Public Prosecutor* [1970] 2 MLJ 283 the Court of Appeal decided that the wording of s. 188 of the Criminal Procedure Code meant that the trial Court was required at the close of the prosecution case to determine whether or not on the evidence tendered by the prosecution, if unrebutted, had established the case against the defendant beyond a reasonable doubt. That case was wrongly decided because it amounts to establishing that at that stage the Court is permitted to decide that the defendant is guilty unless he calls rebutting evidence. That is not the meaning of s. 188. Announcing that the evidence appears to be accurate and that the Court will accept it unless it is impugned is different from saying that there is a *prima facie* case against the defendant. In criminal cases a *prima facie* case is not the same as a case established beyond reasonable doubt. If *Ong Kiang Kek v. Public Prosecutor* is right the trial Court must come to a decision having heard only the prosecution evidence. *Ong Kiang Kek's* case was wrongly decided and in the instant case, since the defendant's trial was conducted in accordance with it, there was a fundamental error in the conduct of the trial and the defendant is entitled to have his conviction quashed. Alternatively, if *Ong Kiang Kek v. Public Prosecutor* was rightly decided, then s. 188 of the Criminal Procedure Code offends Article 9(1) of the Constitution by conflicting with the privilege against self-incrimination.

With the greatest of respect, it is obvious that *Khoo Hi Chiang* could not be correct in treating the judgment of the Privy Council as *obiter dicta* on the issue of burden of poof at the close of the prosecution's case.

As this is the principal basis of *Khoo Hi Chiang's* decision, the conclusion of the Supreme Court must necessarily suffer from such serious defect. Indeed in *Abdul Ghani v. PP* [1985] 1 MLJ 93 the Court of Appeal in Singapore in a criminal reference, Wee Chong Jin CJ, a great Judge that he

was, effectively conceded that to all intents and purposes, his Lordship's ruling in *Ong Kiang Kek* had been overruled by the *ratio decidendi* in *Haw Tua Tau.* Another attempt to revive *Ong Kiang Kek* met with similar fate in *Ng Theng Shuang v. PP* [1995] 2 SLR 36 in which the Singapore Court of Appeal declined to follow *Khoo Hi Chiang*. From other common law jurisdictions, it would appear that the pronouncement in *Khoo Hi Chiang* runs counter to current judicial opinion. Indeed, at the *9th Singapore Law Review Lecture 1995* delivered by Justice MPH Rubin on *Standard of Proof Relating to Sufficiency of Evidence at Criminal Trials: Mental Gymnastics since Haw Tua Tau* [1996] 2 CLJ lxiv, his Lordship strongly concluded:

> The Singapore Court of Appeal, in arriving at its decision, as it did, appeared to have fully addressed itself of an important consideration that the test which was under attack had not only been well-entrenched in our criminal jurisprudence, since 1981 but the practice and philosophy enveloping the test had served the interests of justice well for more than 20 years in Singapore. Indeed its reasoning is supported by a considerable body of learning and judicial pronouncements from other Commonwealth jurisdictions. Though there are some slight variations in substance, a host of decisions from England, Australia and New Zealand appear to support the view that **'the beyond reasonable doubt'** test at the close of the prosecution is inapt and out of place: *R. v. Galbraith* [1981] 1 WLR 1039 at 1042 (England); *May v. Sullivan* [1954-55] 92 CLR 654 at 658 (Australia); *Auckland City Council v. Brailey* [1988] 1 NZLR 103 (New Zealand).

[See also *Yeo Tse Soon v. PP* [1995] 2 CLJ 179 (Brunei)].

Conclusion on the Law

For the above reasons, the case **"which if unrebutted would warrant a conviction"** referred to in s. 180 CPC is a *prima facie* case, and not a beyond reasonable doubt case on the guilt of the accused. With the utmost humility, the principle laid down in *Khoo Hi Chiang* on burden of proof at the close of case for the prosecution should be treated as *per incuriam*. Under the two-tier stage of our criminal trial, the burden imposed on the prosecution by s. 180 at the close of its case is to make out a *prima facie* case, and it is distinct from the burden at the conclusion of the trial under s. 183 which is a beyond reasonable doubt burden on the guilt of the accused. The burden of proof on the guilt of the accused is on the prosecution throughout the trial and it never shifts *(Woolmington v. Director of Public Prosecutor* [1935] AC 462 & 480]. To pronounce otherwise would be in violation of a cardinal principle of our criminal justice system that an accused person must be presumed innocent until proven guilty, not after hearing only the prosecution evidence, but at the conclusion of the whole trial when both sides have been heard in accordance with the rules of natural justice. But by virtue of s. 180, the accused is entitled to an early acquittal if no *prima facie*

case is made out against him. In my humble opinion *Khoo Hi Chiang* has overlooked the distinction between burden of proof and quantum of proof and has unnecessarily gone on a voyage of discovery despite the plain words and hypothetical phrase used in s. 180 and in so doing was usurping the function of the legislature under the guise of interpretation.

In *Vacher & Sons Ltd. v. London Society of Compositors* [1913] AC 107, Viscount Haldane LC said, **"... I think that the only safe course is to read the language of the statute in what seems to be its natural sense"**. But even assuming for one moment that the language of s. 180 is ambiguous and capable of two possible constructions, the law on interpretation demands that the one that produces a reasonable result consistent with the concept of fair trial under the rules of natural justice must prevail. For reasons already given, the *prima facie* case test should therefore be maintained and this Court should resist accepting the guilty beyond reasonable doubt test in the middle of a trial which inevitably involves an unjust shifting and reversal of the burden of proof on the guilt of the accused on the defence, once the accused is called upon to answer - a result which is unthinkable and illogical in our adversarial system of criminal justice whatever may be one's perception of *Haw Tua Tau.* As stated by Danckwerts LJ in *Artemiou v. Procopiou* [1966] 1 QB 878 @ 888, an intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available.

In the circumstances, the main ground of appeal on point of law on burden of proof under s. 180 must fail since the defence had been called on correct principle. The learned Judicial Commissioner was correct in law in applying the *prima facie* case test when calling for the appellant to enter his defence. The only matter left for determination in this appeal is whether having regard to the whole evidence in its totality, the prosecution has proved the guilt of the appellant beyond reasonable doubt at the close of the whole trial. For this purpose, it is necessary to consider the defence raised by the appellant in the Court below.

Has the Defence Raised a Reasonable Doubt as to the Guilt of the Appellant?

The appellant elected to give evidence on oath. There is no dispute that the appellant was arrested by a police ambush party led by Inspector Ismail (PW2) on 8 December 1986 at about 11.30am in a lorry No. WD 5684 in the compound of a mosquito repellant factory called **Blood Protection Co. (M) Bhd.** at Jalan Permatang Pauh, Butterworth, Penang. He was sentenced to death under s. 39B(2). The evidence before the learned Judicial Commissioner disclosed that the police found two bags in the cabin of the lorry, which at the material time was driven by a Malay driver, Mohd. Kabir (PW5) with the

appellant as lorry attendant. There was no dispute in the Court below that two bags were recovered - a brown bag containing the cannabis and a yellow bag which did not contain anything incriminating. The material dispute which the learned Judicial Commissioner had to determine was which bag belonged to whom. Based on testimony of prosecution witnesses, there was sufficient evidence that the incriminating brown bag was in the control or custody of the appellant, particularly when his personal BSN account book was recovered from that bag, so as to attract the presumptions under s. 37(d) and 37(da) of the Dangerous Drugs Act, for the defence to be called on the trafficking charge. In the application of the *prima facie* test as enunciated in *Haw Tua Tau, Ragunathan and Munusamy* the learned Judicial Commissioner was accordingly correct in law in not recording an order of acquittal under s. 180.

The appellant's defence was that on that day he was carrying the yellow bag and not the incriminating brown bag. He met security guard Ravi (PW8) at Ravi's guardroom. He left the yellow bag there unattended in order to have his breakfast at the factory canteen. As regards his BSN account book, he explained that he was carying it in his pocket. Then for security reasons he decided to keep it in the cabin of the motor lorry instead of in the bag. After loading goods on the trailer of the lorry, he went to fetch his unattended bag from the guardroom, and kept it in the lorry. Soon after, the police came, recovered the two bags and arrested him and Mohd. Kabir. He did not know how his BSN account book came to be in the brown bag, but it is the defence story that the appellant had been framed by someone, probably Ravi because it was Ravi who tipped the police about the drug. Unfortunately the non-incriminating yellow bag which the police had seized and which the appellant had claimed to be his was not produced in Court which in my view would invoke an adverse presumption against the prosecution under s. 114(g) Evidence Act that in the circumstances of this case, if the material yellow bag had been produced, the appellant would have been able to identify and prove that it was really his. There are other aspects of the evidence highlighted by Mr. Karpal Singh, particularly the fact that some material parts of the evidence are missing from the notes of evidence due to the inability of anyone to decipher the poor handwriting of the Judicial Commissioner, who is no longer in service, which to my mind are sufficient in this capital case collectively to rebut the presumption of possession on a balance of probabilities and to raise a reasonable doubt as to the guilt of the appellant. I would allow this appeal purely on this basis, notwithstanding the fact that the learned Judicial Commissioner had been correct in law in calling for the appellant to enter his defence on the *prima facie* test. The conviction should accordingly be quashed and the death sentence set aside.

Edgar Joseph Jr FCJ:

Preliminary

This appellant was convicted in the High Court, at Penang, for trafficking in a dangerous drug, to wit, cannabis weighing 1,396.7 grams, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death. The charge alleged that the offence had been committed at 11.30 in the morning of 8 December 1986, in the vicinity of a factory at Jalan Permatang Pauh, in the district of Butterworth, in the State of Penang.

The trial commenced on 20 July 1992 - more than five years after the date of the alleged offence - and after a number of broken hearings, ended on 11 December 1992, with the conviction and sentence of death.

The Case for the Prosecution

The essential facts may be shortly stated.

According to the evidence led by the prosecution, on the date and about the time and place referred to in the charge, a certain Ravi Shankar ('PW8'), who was a security guard, attached to the factory aforesaid, and the star witness for the prosecution, was on duty at the security guard's pondok, which was located close to the entrance gate to the factory. Between 9am and 9.30am on 8 December 1986, the appellant had entered the compound of the factory through a small door, carrying a small chocolate-coloured zip bag ('the brown bag'), and had then entered the pondok.

Ravi Shankar alleged that the appellant had then engaged in a conversation with him, in the course of which, the appellant, having placed the brown bag on a chair in the pondok, for no apparent reason, deliberately showed him its contents, saying they were valuable. These contents included rolls, of what appeared to be herbal material, which Ravi Shankar suspected to be ganja, later, the subject matter of the charge. The appellant had also showed him a sharp instrument which was in the brown bag but was not produced at the trial. He also testified that the appellant had then left the brown bag on a chair in the pondok and departed to make a call, from a telephone located near the pondok, after which the appellant had returned to the pondok, picked up the brown bag and walked towards a lorry parked nearby, he being its attendant, entered it and deposited the brown bag in the driver's cabin. At the wheel of the lorry was its driver, one Mohd. Kabir ('PW5').

Ravi Shankar wasted no time in telephoning the police, as a result of which Inspector Ismail bin Dan ('PW2'), accompanied by four of his men, namely, Det./Cpl. Amir, Inspector Wan Rashid, Det. Murad and Det. Saad had left

the Cawangan Anti Dadah, Butterworth, at about 11.30am on the same day, arriving at the premises of the factory shortly thereafter where he noticed the parked lorry, both its driver and the attendant, that is to say, Kabir and the appellant, respectively, being in its goods' compartment, and engaged in arranging boxes of mosquito repellant.

After a brief detour at the office, adjacent to the factory, to contact personnel there, Inspector Ismail had then walked up to the lorry and conducted a search of it. Upon his instructions, the driver Kabir had opened up a compartment behind the driver's seat, inspection of which revealed the presence of two bags, one being the brown bag, and the other, a Benson & Hedges bag, yellow in colour ('the yellow bag').

On examining the contents of the yellow bag, he found nothing incriminating; that is to say, only clothing and a Bank Nasional savings book in the name of Kabir.

However, on examining the contents of the brown bag, he found several rolls, of what appeared to be herbal material, yellow in colour which fell to the ground and which he suspected to be ganja. The rest of the contents consisted of two underpants, a Bank Nasional savings book, its registered holder being the appellant Arulpragasan a/l Sandaraju. Without first administering the necessary caution under the Act, to either Kabir or the appellant, he asked Kabir whose bag it was, and the latter replied it belonged to the appellant. The witness then asked the appellant the same question but did not testify as to the reply given.

Although there was a dispute at the trial as to whether the bag carried by the appellant was the brown bag or the yellow bag - with the appellant and the driver Kabir accusing each other-the yellow bag was not produced by the prosecution or its non-production accounted for. Nor, was any search list produced. And, when the security guard Ravi Shankar was examined in chief by the DPP and asked if he could identify the bag concerned, he replied, he could. The brown bag, P3 A, was then shown, and he replied: "Warna sama, kebesaran dan tinggi beg, tetapi ada lama sedikit - masa saya nampak beg ... (colour the same, size and height but slightly old - at the time I saw the bag ... (illegible)". (See p. 114 B & C appeal record). This reply to an important question is scarcely intelligible and is aggravated by the illegible handwriting of the Judge who is now no longer in service. These are matters which emphasise the importance of tendering the yellow bag as an exhibit.

Both the appellant and the lorry driver Kabir were arrested and the brown bag with its contents seized by the police. After being detained for 14 days Kabir was released, but the appellant was prosecuted upon the charge aforesaid.

The offending exhibits, to wit, the rolls of suspected cannabis, were promptly dispatched to the chemist who, upon an examination and analysis thereof concluded that the same contained 1,396.7 grams of cannabis as defined under the Act.

Going back a little, the lorry driver Kabir - an obvious suspect - had testified for the prosecution, and the gist of his testimony was that the yellow bag belonged to him but the brown bag belonged to the appellant. It was put to him, by Counsel for the defence, that the appellant's bag was not the brown bag, but the yellow bag. However, he maintained that the appellant's bag was the brown bag.

As for the chemist, he testified that he had on 10 December 1986 about 11am received, by hand, from one Inspector Suhaimi, a sealed package, on opening which he found a plastic sling bag in which were 3,980 brown paper rolls, each of which he found to contain greenish herbal material. He then separated the 3,980 rolls into 79 bundles, each containing 50 rolls and one containing 50 rolls.

He then described the *modus operandi* he had adopted in carrying out the various test in the following terms:

> I opened all the 3,980 brown paper rolls and carried out physical examination visually. From my visual exam I found the herbal material in all the rolls to possess similar gross botanical features eg. leaves, fruits and seeds were similar to each other in all the rolls. I examined the plant material in all the rolls under a microscope. Under the microscope I found all the plant material to possess cystolith hairs which is characteristic feature of cannabis plant and also glandular hairs. Under the microscope I also noted, as ... of resin found on the surfaces of this herbal material after this I then took 400 random rolls as a representative at the test from these 400 rolls took samples of plant material for the next two tests (...) and the thin layer (TLC) test Resinous extract from these 400 samples of herbal material were subjected to the Dy... test where act of them gave a strong violet colour which was extractable with chloroform. This results indicates the presence of cannabinoids in the resinous extract of the herbal material. The resinous extract were then subject to the test where all the resinous extract shows strong positive result for the presence of cannabinoids. This test confirms the presence of cannabinoids which are found only in cannabis plants from all these 4 test ... physical exam ... exam Dy Levin test and TLC test, I confirm that the herbal material found in the 3,980 brown paper rolls to be cannabis from which the resin has not been extracted. Before analysis I ensured all the instruments are in good working condition. The 400 rolls in ... the 3,980 rolls in more than 10%.

Upon the evidence aforesaid, the Judge ruled "that the prosecution had established a *prima facie* case in accordance with the principles enunciated

in the cases of *Haw Tua Tau*, *Ragunathan* and *Munusamy*, and so there was a case to answer", thereby, over-ruling a submission of no case to answer by Counsel for the appellant.

The Case for the Defence

The appellant, who was 18 years of age at the time of his arrest, elected to testify on oath. He claimed that the case against him had been framed. He said that on the day in question, on arrival at the gate of the factory he was carrying, **not** the brown bag but the yellow bag, containing clothing necessary for his overnight stays when on duty. On entering the compound of the factory, he had met the security guard Ravi Shankar who was then in his pondok and, upon enquiry, was told that his lorry had not arrived yet, so he left his bag in the pondok, at the same time, inviting the security guard for breakfast, but the invitation was declined. He then went to the canteen where he had his breakfast and returned about half an hour later, by which time the lorry had arrived and the driver Kabir was standing beside the lorry. He then left his Bank Nasional savings book in what he described as "his sleeping area of the lorry" - referring no doubt, to the compartment in the driver's cabin - moved to the luggage compartment in the lorry and started arranging the boxes there. At that time, he believed that his bag was still in the pondok. His intention then was to collect his bag after completing his task. At that time, there were six or seven persons around the lorry. While he was working on the lorry, the police arrived, ordered him to get down from the lorry which he did. As he stood at the front of the lorry, a male Malay and the driver of the lorry Kabir, got on the lorry, and brought down a box from what he described as "his sleeping area" in the lorry. From the box, the police recovered two bags, to wit, the brown bag and the yellow bag. The appellant claimed that it was the yellow bag which was his but not the brown bag. From the brown bag the police recovered the rolls of suspected cannabis of which the appellant maintained he had no knowledge. He also denied that he had ever carried the brown bag and, consequently, there was no truth in the allegation that he had shown the rolls of ganja in it to Ravi Shankar.

The clear implication arising from the appellant's testimony was that the case against him had been framed, that is to say, that his Bank Simpanan Nasional savings book had been planted in the brown bag, not by the police but by person or persons unknown, and that there was both time and opportunity for this.

The Findings and Verdict in the Court of Trial

The Judge found the security guard Ravi Shankar to be a witness of truth and could think of no reason for rejecting his testimony especially since he was a stranger to the appellant and would have no conceivable reason to

fabricate evidence against the appellant. The Judge considered that the recovery of the Bank Nasional savings book, belonging to the appellant, along with rolls of ganja, from the brown bag, as deposed to by Inspector Ismail, provided highly incriminating evidence against the appellant. He therefore, concluded, that the brown bag belonged to the appellant and that its contents, including the rolls of ganja, were in his possession.

The Judge concluded that, upon the evidence led by the prosecution, the presumptions under s. 37(d) (of possession) and 37(da) (of trafficking) of the Act arose and that the appellant had failed to rebut the same. He accordingly found the appellant guilty of the offence charged and sentenced him to death, being the mandatory sentence provided by Law.

The Grounds of Appeal

Before us, the conviction was attacked on a number of grounds.

First of all, it was submitted that the Judge had misdirected itself as regards the standard of proof required from the prosecution at the close of its case. In particular, it was submitted that the onus on the prosecution, at that stage of the proceedings, was **not** to establish a mere ***prima facie*** **case as** expounded in *Haw Tua Tau v. PP* [1981] 2 MLJ 49, but to tender evidence which, if unrebutted, established the case against the appellant beyond all reasonable doubt. (See *PP v. Lim Teong Seng & 2 Others* [1946] MLJ 108).

On this basis, it was further submitted, in effect, that the Judge should have subjected the credibility of the star witness for the prosecution, namely, the security guard Ravi Shankar, to a more rigorous test than that envisaged in *Haw Tua Tau*, and that had he done so, he would have found it to be wanting, and, in consequence, would have ruled that there was no case to answer and acquitted and discharged the appellant without calling for his defence.

Similarly, it was argued, in the alternative, that had the higher standard of proof aforesaid, been applied to the testimony of the chemist, then the Judge would, in all probability, have found that there was insufficient evidence to prove that the subject matter of the charge, exceeded 200 grammes of cannabis within the meaning of s. 2 of the Act, as the quantity of herbal material he had examined and analysed was less than 10% of the whole, and so, was not a truly representative sample, especially since he had not mixed the whole of the material, before extracting the sample.

I shall now embark upon a consideration of the primary question of Law which arises for decision. In doing so, the topics for discussion have been arranged under sub-headings, some of which overlap, with the result that some repetition will be unavoidable.

The Intermediate Problem of the Standard of Proof

The primary question of Law which arises for decision in this appeal concerns the standard of proof that is required from the prosecution, in criminal trials before a Judge of the High Court, sitting alone, in order that the Judge may rule that there is a case for the accused to answer. The answer to this question depends upon the proper construction of the statutory formula "which if unrebutted would warrant a conviction" appearing in s. 180 of the Criminal Procedure Code ('the Code') which provides:

> When the case for the prosecution is concluded the Court, if it finds that **no case** against the accused has been made **which if unrebutted would warrant his conviction** shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

The sections of the Code which govern the procedure at the close of the case for the prosecution in the Subordinate Courts and in the Court of a Judge sitting alone or with assessors are ss. 173(f), 180 and 190 of the Code, respectively, their wording is the same and their meaning cannot be differentiated. (See *PP v. Lim Teong Seng & 2 Ors. [ibid]* at 109 col. 1 para). Consequently, the discussion which follows regarding the effect of s. 180 would apply with equal force to the effect of ss. 173(f) and 190.

However, the statutory formula, as to the quantum of proof required from the prosecution at the close of its case, in trials by jury in the High Court, under s. 214(2) of the Code, makes different provisions by reason of the dichotomy in the functions of Judge and jury, questions of Law being for the Judge whereas questions of fact are for the jury. (See, *Karam Singh v. PP* [1967] 2 MLJ FC 25, 30 Col. H per H.T. Ong CJ).

On the other hand, in the case of trials before a Judge sitting alone, he is decider of both facts and law.

The **contrast** in the wording of the statutory formulae under ss. 180 and 214(2) will be discussed under the appropriate sub-heading. Suffice it to say at this stage, that s. 214 provides:

> 214. When Court may direct a verdict of not guilty.
>
> (1) When the case for the prosecution is concluded, the Court, if it considers that there is **no evidence that the accused committed the offence**, shall direct the jury to return a verdict of not guilty.
>
> (2) If the Court considers that **there is evidence that the accused committed the offence** the Court shall call on the accused to enter on his defence.

(3) The jury may return a **verdict of not guilty** either unanimously or by a majority at any time after the **conclusion of the evidence for the prosecution** if they consider the case to be one in which they **could not safely convict.**

The Difference Between Establishing a Prima Facie Case and Establishing a Case Beyond All Reasonable Doubt

The expression "**a** *prima facie* **case**" is nowhere to be found in the Code, and, as pointed out in *Khoo Hi Chiang*, suffers from the defect that it is not self-explanatory; what is it that the case shows *prima facie* or at first sight?

Nevertheless, the expression "**a** *prima facie* **case**", has been regularly used in our Courts; often for brevity and convenience, to denote a case to answer, or more particularly, a case "which if unrebutted would warrant a conviction" within the meaning of s. 173(f) or s. 180 or s. 190 of the Code, as the case may be.

However, there has been a difference of judicial opinion here as to what constitutes "**a** *prima facie* **case**" and I had in *Khoo Hi Chiang*, (*ibid* at p. 286 A & B) when speaking for the Supreme Court, referred to some of these cases to illustrate this point.

Be that as it may, in my view, for the reasons which follow, it is wrong in Law to equate a mere "*prima facie* **case**" with "a beyond all reasonable doubt case" as does *Munusamy v. P.P.* [1987] 1 MLJ 492.

The starting point, for the discussion as to what is required to establish a "*prima facie* case", is the Australian case of *May v. O'Sullivan* [1955] 92 CLR 654, where the full High Court (Dixon CJ, Webb, Fullagar, Kitto, Taylor JJ) said *inter alia*, this (at pp. 657 to 658):

> When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant **ought** to be convicted, but whether on the evidence as it stands he **could** lawfully be convicted. This is really a question of law ... After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact ... A magistrate who has decided that there is a "case to answer" may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made "a *prima facie* case", but it does not follow that in the absence of a "satisfactory answer" the defendant should be convicted ...

The second case is *Considine v. Lemmer* [1971] SASR 39, where Bright J, correctly paraphrasing *May v. O'Sullivan* said this (at p. 51):

> I agree that a *prima facie* case, uncontradicted by credible evidence, does not lead automatically to conviction. For the *prima facie* case may do not more than tend to prove guilt: it may or may not, if unexplained, satisfy beyond reasonable doubt. It may contain weaknesses which inspire doubt. To say this is to do no more than paraphrase *May v. O'Sullivan.*

The third case is *Zanetti v. Hill* [1962] 108 CLR 433 at 442 where Kitto J expounded the issue at hand, by stating:

> that is to say, there is with respect to every element of the offence some evidence which, **if accepted,** would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt.

In an article entitled *The Insufficiency of Evidence to Raise a Case to Answer* [1981] 55 ALJ 842 (at p. 845) Mr. Justice Glass concisely but clearly expressed the position thus:

> ... where the evidence of the prosecution witnesses exhibits internal conflict and competing inferences are open, the Judge, in considering whether a case to answer is made out, should assume that the jury will accept the evidence and draw the inference favouring the Crown. He should disregard all the evidence, (whether offered by the Crown witnesses in chief or extracted from them in cross examination) which militates against the prosecution case because the jury has authority to reject it.

Having regard to the principles enunciated in the above authorities and the article by Glass J, the following two examples will help to illustrate the difference between applying **"the *prima facie* case"** test and **"the beyond all reasonable doubt"** test to the prosecution's evidence at the conclusion of its case.

Take a case where the prosecution's evidence points to **two likely inferences, one consistent with guilt, the other with innocence**. In such a situation, if the standard of proof is that of a mere ***"prima facie* case"**, in other words "a *prima facie* supposition that the accused may be guilty", then the trial ought to proceed and the defence would have to be called. (See, *Karam Singh v. P.P.* (*ibid*, at p. 30 Col 2 C & D, per H.T. Ong CJ).

If, on the other hand, the standard of proof is "beyond all reasonable doubt", then in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.

Another example which helps to further illustrate the point that there is a fundamental difference between applying a mere *"prima facie"* standard of

proof and the "beyond all reasonable doubt standard of proof", at the intermediate stage of the trial, would be where, at the conclusion of the prosecution's case, there is **strong prosecution evidence but there remains a reasonable tenable doubt.** In such a situation, if the standard of proof is a mere "*prima facie* case", in other words, a **mere *prima facie* supposition that the accused may be guilty,** then also the trial must proceed, and the defence would have to be called. On the other hand, if the standard of proof is **"beyond all reasonable doubt"**, then, in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.

Furthermore, if the onus on the prosecution at the close of its case, is to establish a mere *"prima facie case"*, the test to be applied is a minimal evaluation of the prosecution's evidence to ensure that it is not **inherently** incredible (see *Haw Tua Tau v. PP*). **Whereas**, if the onus on the prosecution at the close of its case, is to establish a case **"beyond all reasonable doubt"**, then the test to be applied to the prosecution's evidence is a **maximum evaluation** of the prosecution's evidence, which calls for "a more rigorous test of credibility" (per Lord Diplock in *Haw Tua Tau*, *ibid* at p. 54 G), in order to answer the question: if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt? (see *PP v. Fong Ah Tong & Anor*. [1940] MLJ Rep. 190).

In *PP v. Balasubramaniam* [1948] 14 MLJ 119, Callow J rightly directed attention to the **distinction** between making out a "*prima facie* case" and making out **"a case beyond all reasonable doubt"** as follows:

> The learned Counsel for the Crown said a ***prima facie* case** had been made out. He said there is a case, although it may be answerable. I must go further and consider whether if a ***prima facie* case** is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced. The onus is on the prosecution to prove the case and this burden never shifts.

His Lordship then referred, with approval, to the following passage in the judgment of Laville J in *PP v. Lim Teong Seng & 2 Ors.* [1946] 12 MLJ 108 at 109:

> If therefore at the close of the prosecution he as a jury comes to the conclusion, not that there is no evidence, but that the evidence produced is not strong enough to warrant a conviction, and only evidence beyond all reasonable doubt is of that nature, he is not by the spirit of English law entitled to say: "I am doubtful of this evidence but let us see if it can be supplemented and improved by what can be elicited from the defence." The prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they have, and it is on this evidence the conviction if any must rest, even if accused calls evidence. What the prosecution can elicit for its view from them is either

> supplementary or redundant, or goes to lessen the credibility of the defence evidence. It cannot be the basis of a conviction. If therefore at the close of the prosecution the Court is of opinion that on that evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt, there is nothing left for it to do but to acquit the accused.

Clearly, therefore, there is a world of difference between applying the test of a mere "*prima facie case*" and applying *"the beyond all reasonable doubt"* test to the evidence led by the prosecution at the close of its case.

Jury Trial Principles in England in Bare Outline

Very broadly stated, the jury trial principles in England to be distilled from the cases and other sources may be stated thus:

The **basic principle** applicable at the conclusion of the case for the prosecution is that a submission of no case to answer should be upheld when there is no evidence upon which, **if** the evidence led by the prosecution were **accepted,** a reasonable jury properly directed, **could** lawfully convict. This is purely **a question of law** for the Judge and must carefully be distinguished from **the question of fact** for ultimate decision by the jury, namely, whether every element of the offence has been established beyond all reasonable doubt.

The correct **approach** for the Court to adopt in a jury trial, in criminal cases is to be found in *R. v. Galbraith* 73 Cr. App. R. 124 CA where Lane CJ expounded this stating:

> (1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty - the Judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence: (a) where the Judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case; (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury.

To my mind, it is not an unfair summary of the position in England, to say that in a criminal trial before a Judge and jury, when a submission of no case is made, the Judge has to determine the question whether, upon the prosecution evidence, taken at its **highest**, a reasonable jury **could** properly convict. For this purpose, the Judge **presumes** that the jury will accept the evidence of

the prosecution witnesses and, where there is more than one inference, which may be drawn from the primary facts, the inference most favourable to the prosecution will be drawn.

The only **exception** to the rule that the Judge presumes that the jury will accept the evidence of the prosecution witnesses being where their evidence is so inherently incredible that no reasonable person could accept it as true.

It follows, that where there is **legally sufficient evidence** to satisfy the requirements of a case to answer, as explained above, the case must go on and the question whether the evidence should be believed or rejected is a matter for the jury who are triers of fact.

The Sheet Anchor of Lord Diplock's Reasoning in Haw Tua Tau

In *Haw Tua Tau v. PP* [1982] AC 136, Lord Diplock speaking for the Judicial Committee of the Privy Council, in an appeal from Singapore had occasion to consider and to discuss, the effect of the provisions of s. 188(1) of the Singapore Criminal Procedure Code, (equivalent to s. 180 of the Code), and which provided as follows:

> 188(1) When the case for the prosecution is concluded the Court, if it finds that **no case** against the accused has been made out **which if unrebutted would warrant his conviction**, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.

Lord Diplock expressed the view that the proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case, in a non-jury trial in Singapore (and this would apply equally in Malaysia, the statutory formula "*which if unrebutted, would warrant a conviction*" in s. 180 of the Code, being the same as that in s. 188(1) of the Singapore Criminal Procedure Code), *is most easily identified by considering a criminal trial before a Judge and jury* such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. (*ibid* at p. 151).

He next turned to the familiar *functions of the Judge and jury* in England and went on to say (at p. 151 B *et seq*):

> Here the decision-making function is divided; questions of law are for the Judge, questions of fact are for the jury. It is well-established that in a jury trial at the conclusion of the prosecution's case it is the Judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate*, would establish each essential element in any criminal offence is a question of law. If there is no evidence (or only, evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the Judge's duty to

> direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the Judge must let the case go on ...
>
> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact in a single Judge (or two judges trying capital cases).

It is manifestly clear that the sheet anchor of Lord Diplock's reasoning regarding the standard of proof required from the prosecution at the close of its case in Singapore was his *equation of jury trial principles in England and in Singapore* until their final abolition in capital cases in 1969 *with those applicable under s. 188(1) of the Singapore Criminal Procedure Code*. It was as a result of this equation, that he concluded that the statutory formula in s. 188(1) was apt to describe a mere "*prima facie* case". If this part of his reasoning can be faulted, his conclusion on the intermediate problem of the standard of proof required from the prosecution at the close of its case in a non-jury trial in Singapore cannot, in justice, be regarded as unimpeachable.

Criticisms of Haw Tua Tau

With all respect, I must now upon a criticism of *Haw Tua Tau* in some detail.

Why it Would be Artificial to Apply the Haw Tua Tau Standard of Proof to a Non-Jury Trial

The **first criticism** which may be levelled at *Haw Tua Tau* is this: it would be highly artificial and pedantic to require a tribunal such as a Judge sitting alone who decides both questions of law and fact to suspend judgment on, say, for example, the obvious unreliability of the prosecution's evidence and confine himself to considering the **hypothetical question** whether there is evidence on which a **hypothetical jury** might or could convict, even though the Judge himself does not believe the evidence for the prosecution.

To take the point further, if in such a situation the Judge over-rules a submission of no case, saying that although he himself does not believe the evidence for the prosecution, a hypothetical jury might accept the evidence and so *could or might* convict. Then, upon the defence being called, Counsel for the defence calls no evidence and, in his final address, submits that the accused must be acquitted praying in aid the Judge's finding that he did not himself believe the evidence for the prosecution. In such a situation, the Judge would have to acquit, thus putting himself in the invidious position of having over-ruled the submission and then, soon afterwards, on precisely the same evidence, upheld it.

I have already mentioned the sharp *contrast* in language between the statutory formulae under ss. 180 and s. 214(2) of the Code and its significance when

referring to the intermediate problem of the standard of proof required from the prosecution at the conclusion of its case.

It is obvious that s. 214(2) is a statutory enunciation of what was always the common law of England as propounded by Lord Diplock in *Haw Tua Tau*; this is the test of a mere *prima facie* supposition that the accused may be guilty which a trial Judge in a jury trial in England should apply in determining whether there is a case to answer. This test can readily be applied in jury trials in Malaya because the provisions of s. 214(2) (reproduced above) recognise the dichotomy in the functions of Judge and jury; while the Judge decides all questions of law the consideration of the evidence adduced would be for the jury and they alone would be entitled to estimate its weight and decide upon its effect. In other words, questions about the *legal sufficiency* of the evidence, when the case for the prosecution is concluded, are for the Judge, while questions about the *quality and reliability* of evidence, when the case for the defence is concluded, are for the jury.

However, the above principles which apply to jury trials at the conclusion of the case for the prosecution should **not** apply to a trial in the High Court before a Judge sitting alone, in Malaysia, which is governed by the provisions of s. 180 of the Code, (reproduced above) where the statutory formula is "which if unrebutted would warrant a conviction" and when the Judge is a Judge **both** of facts and law. I derive analogical support for this in the following passage in *Archbold on Criminal Pleading Evidence & Practice* - probably the most respected practitioners' textbook on the subject in the United Kingdom - (see the 1993 Edn. - para. 4-307 p. 1/564) - which indicates that even in England, jury trial principles should not apply where the tribunal is a decider of law and fact:

> In their summary jurisdiction magistrates are Judges both of facts and law. It is therefore **submitted** that even where at the close of the prosecution case, or later, there is some evidence which *if accepted*, would entitle a reasonable tribunal to convict, they nevertheless have the same **right** as a jury to acquit if they do not accept the evidence, whether because it is **conflicting, or has been contradicted or for any reason**. It is **submitted** that the practice note reported in [1962] 1 All ER 448 must be read in this light. In any event there appears to be no authority as to the issue of practice directions in criminal matters relating to questions of law as opposed to practice.

The portions of Lord Parker's Practice Note, reported in [1962] 1 All ER 488, so far as material to this part of the case, read as follows:

> Without attempting to lay down any principle of law, we, think that as a matter of practice justices should be guided by the following considerations. A submission that there is no case to answer may properly be made and upheld: (a) when there has been *no evidence* to prove an essential element in the alleged

> offence; (b) when the evidence adduced by the prosecution has been *so discredited* as a result of cross-examination or is *so manifestly unreliable* that no reasonable tribunal *could* safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal *might* convict. If a reasonable tribunal *might* convict on the evidence so far laid before it, there is a case to answer.

The Diplock test in *Haw Tua Tau* is no more than an **amplification** of Lord Parker's Practice Note and, therefore, it too is flatly contradicted by Archbold.

Haw Tua Tau Equates the Words "If Accepted" with the Words "If Unrebutted" - Is That Right?

The **second criticism** which may be levelled at *Haw Tua Tau* is this: Lord Diplock in his judgment had treated the words **"if unrebutted"** in s. 188(1) of the Singapore Criminal Procedure Code (equivalent to our s. 180) which convey a **negative concept** as though they mean no more than **"if it were to be accepted as accurate"** which convey a **positive concept**. In so holding, he was greatly influenced by the principles applicable in a criminal trial before a Judge and jury in England with which he must have been familiar since his practice days though he was always better known as an eminent constitutional lawyer. At the risk of some repetition, this is what he said, on the point (at p. 51 col. 2 D):

> Section 188(1) states the conditions precedent to the right and duty of the Judge of trial to call on the accused to enter on his defence ...
>
> The crucial words of s. 188(1) are the words "if unrebutted" which makes the question that the Court has to ask itself a purely hypothetical one ...
>
> The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is **most easily identified by considering a criminal trial before a Judge and jury, such as occurs England** and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the Judge, questions of fact are for the jury. It is well-established that in a jury trial at the conclusion of the prosecution's case it is the Judge's function to decide for himself whether evidence has been adduced which, **if it were to be accepted by the jury as accurate**, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only, evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the Judge's duty to direct an

> acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the Judge must let the case go on.

And, later still (at p. 52 col 1, F,) he said this:

> In their Lordships' view **the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single Judge ...**

Turning to the question of construction, the words "**if unrebutted**" in s. 180 of the Code (reproduced above) mean "if uncontradicted" or "if unexplained" or "if unrefuted" by counter proof or opposing testimony **to be adduced by the defence** and convey, as I have said, a **negative concept**. Rebuttal evidence, embraces all evidence which tends to contradict, explain, refute or discredit, and, generally speaking, all evidence which tends to counteract or overcome, the evidence adduced by the prosecution up to the close of its case. In the context of s. 180 of the Code, "rebuttal evidence" can only have reference to the evidence to be adduced **by the defence** (if any). The word "***if***", in s. 180 imports a condition precedent or imposes a contingency on the fulfilment of which the legal consequences therein, laid down, to wit, "**would warrant a conviction**" as explained in the next topic to be discussed, must follow.

In practical terms, the effect of the words in s. 180 of the Code, to wit, "if unrebutted would warrant a conviction" is that the Judge "is bound at the conclusion of the case for the prosecution to decide definitely which, if either of two possible but incompatible versions of the facts have been **proved**". (Per Spencer-Wilkinson J in *Mohamed Kassim v. R* [1956] MLJ 212, 213). And, as the same learned Judge put it in *Mohamed Yatim bin Abu Bakar* [1950] MLJ 57, at 59: "In this country, at the close of the case for the prosecution, the Court will not call for his defence, unless the evidence of the prosecution witnesses is, in the first instance, **believed**." In other words, the Judge must, at that stage, **decide** whether the prosecution witnesses are telling the truth. This is not a hypothetical question of law but an actual and real question of fact.

On the other hand, the words of the hypothetical question in *Haw Tua Tau*: "whether evidence has been adduced by the prosecution which **if it were accepted as accurate**, would establish each element in the alleged offence?" forbid the trial Judge in non-jury case at the conclusion of the case for the prosecution to determine whether the prosecution witnesses are telling the truth. In other words, the question, at that stage, for the determination of the trial Judge is: whether or not there is **some evidence** (not inherently improbable) - which taken at its full face value - support on a "minimum basis" the allegation that the accused committed the offence. It follows that the words

"which if he were to accept it as accurate" has reference only to the evidence adduced **by the prosecution** and convey, as I have said, a **positive concept**. In carrying out this task, the trial Judge ignores questions as to the **quality and reliability** of the evidence adduced by the prosecution and instead directs his attention to its **legal sufficiency***:* is there evidence on which a hypothetical jury **could** at the end of the whole trial convict?

In my view, therefore, the expression **"if unrebutted"** is not synonymous with the expression **"if he were to accept it as accurate"**; indeed, the two expressions are poles apart.

Here then is where Lord Diplock **erred** in *Haw Tua Tau*. He treated the words **"if unrebutted"** as meaning no more than **"if he were to accept it as accurate"**, thus drastically rewriting s.180, and it was this error which caused him to apply the much lower standard of proof, to wit, a mere "*prima facie* case", to the evidence for the prosecution at the close of its case. Furthermore, **the effect** of his express reliance on English jury trial principles, meant that he was treating the words **"would warrant a conviction"** as meaning no more than **"could or might warrant a conviction"** - thus, again re-writing s. 180.

Interpretation of the Words "Would Warrant a Conviction"

Whilst still on the second criticism of *Haw Tua Tau*, the group of words in s. 180 which next call for consideration are the four words **"would warrant a conviction"**, which immediately follow the words **"if unrebutted"**.

According to the *American Words and Phrases* (Permanent Edition) published by West Publishing Co., Vol. 46, p. 365, the word "would" means necessarily "will" and expresses an element of certainty far greater than that expressed by 'could'. *U.S. Cas. Co. v. Kelly*, 50 S.E.2 238, 240, 78 Ga. App. 221. *Black's Law Dictionary*, 6th Ed. defines the word "would" as "A word sometimes expressing what might be expected or preferred or desired. Often interchangeable with the word 'should' but not with 'could'." Nor, for that matter, can the word "would" be interchangeable with "might". (See, the second and third sentences of the last para of Lord Parker's Practice Direction quoted at p. 34 *ante*.)

As for the word "'warrant", in the context of s. 180, I respectfully agree with Laville J, when he said in *PP v. Fong Ah Tong & Cheong Chi Shen* [1940] MLJ 240: "Warrant in my view is a strong word and excludes any doubts."

The Statutory Formulae in Sections 180 and 214(2) of the Code when Compared and Contrasted Point to Different Standards of Proof at the Intermediate Stage

In trials in the High Court, before a Judge sitting alone s. 180 of the Code (reproduced above) provides that the statutory formula applicable at the close of the case for the prosecution is **"which if unrebutted would warrant a conviction"**.

However, in trials by jury in the High Court, s. 214(2) of the Code (reproduced above) makes very different provisions namely, **"there is no evidence that the accused committed the offence"**, by reason of the dichotomy in the functions of Judge and jury; that is to say, questions of Law are for the Judge, while questions of fact are for the jury.

The **contrasting language** of the statutory formulae in s. 180 and in s. 214(2) suggests that the legislature intended to provide for different standards of proof required from the prosecution at the close of its case, depending on whether the trial is a non-jury trial or a jury trial, the general rule of construction being that a deliberate change of expression denotes a change of meaning. (See *Ricket v. Metropolitan Railway Co.* [1867] LR 2 HL 175, per Lord Westbury at 207). This rule has much to be said for it, for one may well ask, why when the earlier statutory formula under s. 180 of the Code is available and has been used, the draftsman should change the wording thereof when drafting s. 214(2), if he did not intend the different statutory formula to bear a different meaning.

In my view, the statutory formula in s. 180 is apt to describe the **"beyond all reasonable doubt"** standard of proof whilst the statutory formula in s. 214(2) is apt to describe a lesser standard of proof, that is to say, "a mere *prima facie* case" or in other words, a mere *prima facie* supposition that the accused may be guilty.

Forty six years ago Laville J in *Fong Ah Tong & Anor. v. PP (ibid)* had occasion to make a comparison - in my view quite correctly - between the different standards of proof required from the prosecution at the close of its case in a trial by a Judge with the aid of assessors under s. 190 of the Code (where the statutory formula is identical to trials before a Judge sitting alone under the aid of assessors under s. 180 of the Code) and in a trial before a Judge and jury under s. 214 of the Code. This is how his Lordship put it:

> But by s. 190 it would appear that there is an onus cast on the presiding Judge at a trial with the aid of assessors to decide at the end of the prosecution evidence, **not** as in jury cases whether there is **any evidence at all** of the guilt of the accused, to go to the jury, but a **greater onus** namely whether the prosecution evidence, if no evidence is given at all by accused **would justify a conviction**. 'Warrant' in my view is a strong word and excludes any doubts by the Court.

> The evidence which would warrant a conviction, if unrebutted, is evidence that satisfies the Court beyond all reasonable doubt that the accused is guilty of the offence charged or some lesser offence.
>
> The criterion therefore on which the Court must work is, if there is no more evidence has the prosecution proved its case beyond all reasonable doubt.

I wish to add that, it is obvious that the statutory formula in s. 214(2) is apt to describe the *prima facie* test enunciated by Lord Diplock in *Haw Tua Tau*, since the words **"there is no evidence that the accused committed the offence"** could be expanded to include a situation "where the only evidence is so inherently incredible that no reasonable person could accept it as being true". This is because the latter situation is virtually the same as **"no evidence that the accused committed the offence"**.

Similarly, the words of the applicable statutory formula, in s. 214(3) of the Code (quoted above, and *in pari materia* with s. 199(3) of the old Singapore Criminal Procedure Code and its successors) **"... could not safely convict ..."** are also apt to describe a mere *prima facie* case as expounded by Lord Diplock in *Haw Tua Tau*. In *R v. Koh Soon Poh* [1935] MLJ 120, 122 Terrell J delivering the judgment of the Court of Criminal Appeal in Singapore having first reproduced s. 199 of the old Singapore Criminal Procedure Code, said this with regard to sub-s. 3 thereof (at p. 122 col 2, the last para):

> In our opinion, the sub-section merely declares what was always the common law of England, namely, that after the jury have heard all the evidence for the prosecution they can stop the case if they do not think it would be safe to convict.

It is noteworthy that s. 214(3) of the Code provides another way, quite distinct and separate from the defence making a no case to answer submission under s. 214(2) of the Code, in which the trial can be terminated at the close of the case for the prosecution or indeed, at any time thereafter.

By way of general observation, I can see that the legislature in its wisdom did not impose on the prosecution at the close of its case, in a jury trial, **"the beyond all reasonable doubt standard"** because to do so would mean, that the Judge would have to intrude into the province of the jury by weighing the evidence and deciding on the effect of the evidence. Moreover, if the Judge were to apply **"the beyond all reasonable doubt standard"** and rule that there is a case to answer, "it would be enabling the Judge in such a case to say that the jury must in law find the prisoner guilty and so make the Judge decide the case and not the jury, which is not the common law." (Per Viscount Sankey in *Woolmington v. DPP* [1935] AC 462, 480). Clearly, in the absence

of express statutory provisions, these considerations are wholly inapplicable to a criminal trial before a Judge in a non-jury case, who is decider **both** of facts and law.

This brings me to the **third criticism** which may be levelled at *Haw Tua Tau* and it is this: Lord Diplock failed to recognise, the **difference in the wording** of the statutory formula in s. 188(1) of the Singapore Criminal Procedure Code (equivalent to our s. 180 of the Code) which applied exclusively to trials in the High Court in non-jury cases and the corresponding statutory formula in s. 199(2) of the old Singapore Criminal Procedure Code and its successors (*in pari materia* with our s. 214(2) of the Code) which applied exclusively to trials by jury in the High Court in Singapore until their final abolition in capital cases in 1969 and the **principles** underlying these differences. These **principles** relate to the functions of a Judge (or Judges in capital cases) sitting alone as compared to the dichotomy in the functions of a Judge sitting with a jury; in the case of the former, he is decider of both facts and law **whereas** in the case of the latter, questions of law are for the Judge and questions of fact are for the jury.

For these further reasons, also, the statutory formula in s. 180 is apt to describe the "beyond all reasonable doubt' standard.

Would Applying the Khoo Hi Chiang Standard of Proof be Unfair to the Accused?

The **fourth criticism** which may be levelled at *Haw Tua Tau* is this:

In supporting his view as regards the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Singapore, contrary to that of Wee Chong Jin CJ in *Ong Kiang Kek,* Lord Diplock referred to two things:

> For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the Court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed, it would run counter to the concept of what is a fair trial under that system to require the Court to do so. (see p. 51 col 2 D to E)

What Lord Diplock is implying here is that if the effect of s. 188(1) is to impose on the prosecution the burden of proving its case beyond a reasonable doubt before the accused can be called upon to enter upon his defence, then the law would be unfair, for the accused would be left with the impression that the Judge has made up his mind, before hearing his defence.

With respect to Lord Diplock, the **"beyond all reasonable doubt"** standard of proof if applied to the prosecution's evidence at the close of its case, subjects it to a more rigorous test of credibility, when compared to the *Haw Tua Tau* standard of proof of a mere ***"prima facie* case"**, leaving it open to the accused to introduce evidence which could raise a reasonable doubt either as to the truth of the prosecution's case or as to his guilt.

Moreover, on a further ground also, applying "the beyond all reasonable doubt" standard of proof to the prosecution's evidence instead of the *Haw Tua Tau* standard of proof of a mere "*prima facie* case", at the close of its case, is more favourable to the accused. Many accused persons are incriminated by their own evidence or that of their witnesses, so that what might initially appear as a weak case may gain strength from the evidence for the defence.

In point of fact, however, contrary to what Lord Diplock thought, the "beyond all reasonable doubt' standard of proof, if applied to the prosecution's evidence, at the close of its case, is predominantly favourable to the accused and can be supported as a matter of logic. Take, for example, a case where at the close of the case for the prosecution, the evidence predominantly favours the prosecution but yet there exists a reasonable doubt, then, if the standard of proof is the usual criminal standard of **proof beyond reasonable doubt**, there is failure on the part of the prosecution to meet its obligation and to continue the trial would not be justified. Yet, in the same situation, if the *Haw Tua Tau* standard of proof of a mere "*prima facie*" case were applied to the prosecution's evidence, the defence would have to be called, in which case, should the accused testify or call witnesses, he might thereby be further incriminated and may well be convicted.

One of the main objects of a submission of no case is to protect an accused against a prosecutor who has failed to make out a case and hopes to repair deficiencies in his own case by cross-examination of the accused and witnesses called on his behalf. Therefore, the greater the burden on the prosecution to establish a case the greater the protection offered to the accused.

It follows, that the *Khoo Hi Chiang* standard of proof far from causing prejudice and unfairness to the accused, operates to his advantage.

There is a further ground for disputing the proposition that **the philosophical foundation** underpinning the reasoning of Lord Diplock in *Haw Tua Tau* was to avoid prejudice and unfairness to the accused.

It should be emphasised that the *Haw Tua Tau* principles are really but an amplification of Lord Parker's Practice Note reported in [1962] 1 All ER 448 (the direction therein produced above). The question what led Lord Parker to

issue his Practice Note, therefore, merits consideration. It is answered, for us by the first two sentences of the Practice Note itself which read as follows:

> *Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this Court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure.*

Clearly, therefore, **the philosophical foundation** underpinning Lord Parker's Practice Note had nothing to do with a desire to avoid prejudice and unfairness to the accused; on the contrary, his Lordship was concerned about **too many premature acquittals,** and it was this concern which led to the issue of the Practice Note.

It could be plausibly argued that the *same* philosophical foundation underpins the reasoning of Lord Diplock in *Haw Tua Tau*, though the does not say so.

Remaining Criticism of Haw Tua Tau

Next, in supporting his view as regards the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Singapore, which was contrary to the view of Wee Chong Jin CJ in *Ong Kiang Kek*, Lord Diplock added a further point which, with respect, also appears untenable. Having explained why he considered that there was a parallel between a criminal trial before a Judge sitting alone in Singapore and a trial before a Judge and jury such as occurs in England, he then attempted to demonstrate how absurd it would be in a trial before a Judge and jury to apply the **"beyond all reasonable doubt"** standard of proof to the prosecution's evidence at the close of its case by stressing that if this were done and a submission of no case were over-ruled, the jury would have to retire, consult together again and bring in what in effect would be a conditional verdict of guilty before the accused has had the opportunity to put before them any evidence in his defence. (at p. 52 col I D).

Lord Diplock's remarks here, are of the *reductio ad absurdum* type. No one would dispute that it would be not only impractical, but, indeed contrary to law **to apply the beyond reasonable doubt standard of proof** to the prosecution's evidence at the close of the case for the prosecution, in a jury-trial for the reasons I have already stated. But, what Lord Diplock appears to have overlooked was that the provisions of s. 199(2) of the old Criminal Procedure Code of Singapore and its successors (until their repeal in 1969, when capital cases before a Judge and jury were finally abolished) and s. 214(2) of the Code in this country, made it quite clear that the statutory formula applicable to the prosecution's evidence, at the close of the prosecution's case in jury trials was, "**if there is no evidence that the**

accused committed the offence," which are strong words and, for the reasons stated, are apt to describe the *Haw Tua Tau* standard of proof of a mere *prima facie* case.

In practice, a submission of no case to answer is always made to the Judge in the absence of the jury (*Williams v. R.* [1982] WAR 277). If the submission fails, the jury knows nothing about the submission since they are sent out of Court while it is advanced and no mention is made about what occurred in their absence. So, the situation envisaged by Lord Diplock of the jury having to retire, consult together again and bring in what in effect would be a conditional verdict of guilty before the accused has had the opportunity to put before them any evidence in his defence could never arise.

What we are concerned with here, as was the case in *Haw Tua Tau* and *Ong Kiang Kek*, is a non-jury trial, for which the statutory formula applicable to the prosecution's evidence at the close of its case, is *"which if unrebutted would warrant a conviction"* where the Judge is trier of fact and law, the effect of which has already been discussed. This is a test which is easy for the Judge sitting alone to apply for, in the words of Spencer-Wilkinson J, in *PP v. Annuar bin Ali* [1948] MLJ 38, (at p. 39 col.1 para. 2):

> .... When a Judge is sitting alone, it is **easy for him to reach this finding** [referring to the finding required to be made by the Judge sitting alone, at the close of the case for the prosecution under s. 180 of the Code], because he is the sole judge of law and fact, and he is the person who has to be satisfied beyond a reasonable doubt of the accused's guilt and must know at that stage whether or not he has believed the witnesses; ...

Summing Up the Criticisms of Haw Tua Tau

Summing up this part of the case, I would say, that Lord Diplock never gave detailed consideration to the question of construction of the actual words of s. 188(1) of the Singapore Criminal Procedure Code (equivalent to s. 180 of our Code) and instead was undully swayed by jury trial principles in England. This may not be surprising since the question of construction was never argued ***on both sides*** before the Board. At p. 146, E, F, *ibid*, Lord Diplock said:

> ... The **only** question argued before this Board was the contention, common to all three appellants, that the amendments made to the Criminal Procedure Code by Act No. 10 of 1976 were inconsistent with Article 9(1) of the Constitution of Singapore that "No person shall be deprived of his life or personal liberty save in accordance with law" and, being inconsistent, were rendered void by Article 4.

As a result he treated the words "*if unrebutted*" in s. 188(1) as meaning no more than "*if accepted*". Furthermore, although he did not expressly say that

he was treating the words in s.188(1) "*which if unrebutted would warrant a conviction*" as meaning no more than "which, if unrebutted, *could* or *might* warrant a conviction," that was clearly *the effect* of his express reliance on the jury trial principles in England. And, it is this which led him to hold the words of the relevant statutory formula were apt to describe a mere "*prima facie* case".

Observations on Tan Boon Kean v. PP –
Identifying the Ratio Decidendi in Khoo Hi Chiang

I now, turn to consider the case of *Tan Boon Kean v. PP* [1995] 3 MLJ 514, where a **three** member panel (Mohd Azmi bin Kamaruddin and Wan Yahya bin Pawan Teh FCJJ and Zakaria JCA) of the Federal Court (the successor of the Supreme Court) purported to over-rule the unanimous decision of a **five** member panel (Abdul Hamid Omar LP, Mohd. Jemuri Serjan CJ (Borneo), Edgar Joseph Jr. SCJ, Mohd Eusoff Chin SCJ and Mohamed Dzaiddin Hj. Abdullah SCJ) of the Supreme Court on the point concerning the standard of proof required from the prosecution at the close of its case, under s. 180 of the Code.

The **first** observation I should like to make regarding this part of the case, is that is quite clear from the anti-penultimate paragraph of the judgment of the Court in *Tan Boon Kean*, (at p. 536 E, F) that the Deputy Public Prosecutor Mr. Stanley Augustin had **conceded** that the appellant there ought to have been convicted of the offence of possession of heroin rather than the offence of trafficking in heroin. The Court, quite rightly, following the usual practice when such a concession is made, substituted a conviction for the lesser offence of possession of heroin. I mention these matters because if this concession came at the commencement of the hearing of the appeal and Counsel for the appellant had been content to accept the concession, then there was no need at all for the hearing of the appeal to have proceeded and whatever pronouncement the Court made on the standard of proof required from the prosecution at the close of its case would be *obiter*.

Next, the Federal Court in *Tan Boon Kean v. PP* [1995] 3 MLJ 514 correctly recognised that it was bound by the *ratio* in *Khoo Hi Chiang* since in the latter case the Court was comprised by a panel of five Judges who were unanimous.

But more to the point, in attempting to identify the *ratio decedendi*, the Court correctly began by referring to the following passage in the judgment in *Khoo Hi Chiang* at p. 290.

> Consequently, the duty of the Court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the

prosecution in order to determine whether or not the prosecution evidence is inherently incredible - the *Haw Tua Tau* test - but, a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

The Court then proceeded to say:

> As far as we are able to gather, the interpretation of the word 'case' referred to in s. 180 only appears in *Khoo Hi Chiang* from pp. 285-286 as an *obiter dicta* whilst the Court .. was dealing with the **principal issue** of maximum evaluation of the evidence ...

The Court then concluded:

> ... it seems clear that the only *ratio* in the Supreme Court judgment is on the requirement of maximum evaluation of the evidence at the close of the case for the prosecution. We are of the view that that is the crux of the principle laid down in *Khoo Hi Chiang* ... .

And in the next paragraph the Court added:

> Apart from the question of evaluation of the evidence for the purpose of s. 180, we are unable to accept any suggestion by Counsel that *Khoo Hi Chiang* has made any other binding pronouncement which can be said to have replaced the *prima facie* case test imposed by s. 180. As stated earlier on, there is only a passing observation on the apparent difference in judicial opinion as to what constitutes a *prima facie* case in s. 180. There is no serious discussion on the interpretation of s. 180 as to why the 'case' which the prosecution is required to establish must be changed from 'a *prima facie* case' to 'a beyond reasonable doubt case'. As is normal in any *obiter dicta*, the Supreme Court has deliberately and correctly declined to give any new interpretation to the crucial words 'if unrebutted' and the word 'would' in both sections of the Code, which have consistently over the years been interpreted by our Courts as no more than a *prima facie* requirement notwithstanding any distinction between jury and non-jury trials.

And a little further down:

> ... The first part of the sentence on the need for maximum evaluation of the evidence is clearly the *ratio* of the judgment, whilst the second limb which is founded one purpose or object of the maximum evaluation has been incorporated as *obiter* on the basis of mere observation.

It is trite learning that the interpreter has nearly as much say as the speaker so far as the meaning of words is concerned but, with great respect, the Court in *Tan Boon Kean* misunderstood the *ratio* in *Khoo Hi Chiang*.

A perusal of the main judgment of the Court in *Khoo Hi Chiang*, which ran into 20 pages (pp. 273-293) of the report in the *Malayan Law Journal* [1994]

1 MLJ 265, will show that the principal points of law argued before the Supreme Court were two-fold: namely, the standard of proof required from the prosecution to establish a case to answer having regard to s. 180 of the Code, and the competency of the chemist to testify regarding the results of his examination and analysis of the drug the subject matter of the charge. At p. 277 B to C of the report the Court in *Khoo Hi Chiang* said this:

> Before us the convictions were attacked on a number of grounds.
>
> The principle points of law argued were two-fold: firstly, that: in ruling that the appellants had a case to answer, the Judge had relied on the test laid down by Lord Diplock in *Haw Tua Tau* which requires only a minimal evaluation of the evidence at the close of the case for the prosecution to ensure that it is not inherently incredible. It was said he was wrong in so doing as the onus on the prosecution at the close of its case was not to establish **a *prima facie* case**, but to tender evidence, which if unrebutted, **would** warrant a conviction. (See s. 180 of the Code).

Then followed a lengthy discussion of the point of law concerning the standard of proof it being the point that was most fully argued - which took up 14 of the 20 pages of the judgment (pp. 277 - 291), and included a survey of numerous Malaysian cases going back some 50 years, and ending with the following four paras (none of which are referred to in *Tan Boon Kean*), which make it obvious what the *ratio decidendi* of the case was:

> Looking back, what all this lengthy discussion comes to is whether we can treat the words 'which if unrebutted would warrant a conviction' appearing in ss. 180, 190 and 173(f) of the Code as meaning no more than 'which if unrebutted could or might warrant a conviction'.
>
> With all due respect to Lord Diplock - and we say this humbly, even without reference to the wealth of longstanding decisions by Judges in this country and in Singapore to which we have referred, and only after careful thought - that we are unable to treat the words 'which if unrebutted would warrant a conviction' as meaning no more than 'which if unrebutted could or might warrant a conviction'. To do so would amount to making an unauthorised amendment to a statutory provision which touches the liberty of the subject. With the support of the long-standing decisions to which we have referred, our view would be a *fortiori*.
>
> It follows, therefore, that in this country, at the close of the prosecution's case, the question for decision by the trial Judge, (except when he is sitting with a jury), is not just 'a' hypothetical question of law but an actual and quite different question of fact illustrated by the numerous Malaysian and Singaporean cases decided before our Courts were infected by the *Haw Tua Tau* virus.

> With considerable regret therefore, we must decline to follow *Haw Tua Tau* and its progeny *Ragunathan v. PP* [1982] 1 MLJ 139, *Munusamy v. PP* [1987] 1 MLJ 492, and *Junaidi bin Abdullah v. PP* [1993] 3 MLJ 217, as to the effect of the relevant statutory provisions of the Code to which we have referred and discussed.

Clearly, therefore, *Khoo Hi Chiang* decided, after full argument on the point and after much thought and dialectic to discussing a controversial problem of law, that the standard of proof required from the prosecution at the close of its case, in non-jury trial in Malaysia is, having regard to the relevant statutory formulae, the usual criminal standard of proof, to wit, the beyond all reasonable doubt standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution, that is to say, "a more rigorous test of credibility" was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* standard of proof of a mere *prima facie* case which called for a minimal evaluation of the evidence tendered by the prosecution, thereby over-ruling *Haw Tua Tau*, on that point.

I might as well add that the *ratio decidendi* in *Khoo Hi Chiang* was correctly identified by McMullin Commissioner in *Yeo Tse Soon & Anor v. PP* [1995] 3 MLJ 255, speaking for the Court of Appeal of Brunei, when he said:

> The decision in *Khoo* is thus **evidently** something of a **watershed** in the Malaysian case law on this topic and is clearly intended as a call to order, drawing back the Malaysian Courts from a temporary wandering in the diversionary path of the English Judge and jury procedure.
>
> Although the decisions of the Board were formerly binding on the Malaysian and other common law Courts in this area, they are no longer so in Malaysia. Moreover, the learned Supreme Court Justice was also able to depart from *Haw Tua Tau* in this instance since, as he correctly said, this observation of Lord Diplock did not form part of the *ratio decidendi* in that case.

Since the Court in *Tan Boon Kean* had quite correctly acknowledged that it was bound by the *ratio* in *Khoo Hi Chiang*, but went on, with respect, to misunderstand the *ratio* in *Khoo Hi Chiang*, on this ground alone, *Tan Boon Kean* should not be followed on the point regarding the standard of proof required from the prosecution at the end of its case in a non-jury trial.

To take this part of the case further, if I may say so, and again, with respect, the Court in *Tan Boon Kean* had also misunderstood the purpose of the **"minimum evaluation"** and **"maximum evaluation"** tests to be applied to the evidence led by the prosecution at the close of its case as expounded in *Khoo Hi Chiang* and it is this topic that I shall next discuss.

The Minimum Evaluation Test

In *Haw Tua Tau*, Lord Diplock made it clear that the duty of a Judge in a non-jury trial, as much as a jury trial, when considering the question whether the accused has a case to answer, is to act on the **presumption** that all the prosecution's evidence of the primary facts, is true, **unless** it is inherently so incredible that no reasonable person would accept it as being true. In other words, the **one exception** to the principle that the prosecution case must be taken at its highest is: if the only prosecution evidence "is so inherently incredible that no reasonable person could accept it as being true", in which case, the accused should be acquitted without his defence being called.

It follows, therefore, that the *Haw Tua Tau* standard of proof when applied to the prosecution's evidence at the close of its case, requires the Judge to undertake **a minimal evaluation** of such evidence, for the purpose of determining whether or not it is inherently incredible. This is what is meant by a **minimal evaluation** of the prosecution's evidence at the close of its case. I thought that the Supreme Court had made this point clear in *Khoo Hi Chiang*.

The Maximum Evaluation Test

Conversely, by "the **maximum evaluation**" test referred to in *Khoo Hi Chiang*, is meant, what Lord Diplock described in the final para of his judgment in *Haw Tua Tau* (*ibid*, at p. 54G) as "a more rigorous test of credibility", that is to say, proof beyond all reasonable doubt "which requires the Judge **to decide definitely**, at the close of the case for the prosecution, which, if either, of two possible but incompatible versions of the facts has been **proved**". (per Spencer-Wilkinson J in *Mohammed Kassim v. R.* [1956] 2 MLJ 212.) And, "if the prosecution fails to produce evidence **which is believed** and which if unrebutted would make out every such ingredient then the case must be dismissed without the accused being called upon to make his defence. If he is called upon to make his defence then the Court must consider the evidence as a whole and, if satisfied that every ingredient of the offence has been proved, then convict". (per Thomson CJ in *PP v. Lee Ee Teong* [1953] MLJ 244).

If, upon the defence being called, the accused elects to remain silent and calls no evidence then, the Court **must** convict. In this I am supported by the case of *PP v. Man bin Abas* 1 M.C. 160, where Howes J said:

> ... the Magistrate called upon the accused to enter upon his defence, and the accused through his Counsel then announced that he was not putting up any defence.
>
> The Magistrate ... acquitted the accused on both charges.

> The action of the Magistrate appears inconsistent. By calling on the accused to enter upon his defence, the Magistrate showed that he believed the evidence for the prosecution, and yet he acquitted the accused.
>
> I therefore hold that this decision was against the weight of evidence; and for this reason .... I order that the accused be retried on the same charge by another Magistrate.

Similarly, in *P.P. v. Lee Yee Heng* [1938] MLJ 117 Lt 118, Cussen J said:

> At that stage, when the Magistrate called upon the accused to enter upon his defence, the record shows that thereupon Counsel for the accused stated that the accused did not wish to give evidence.
>
> In view of the defence being called upon the Magistrate must then, under s. 173(h) of the Criminal Procedure Code, have been of the opinion 'that there were grounds for presuming that the accused had committed the offence charged.
>
> When no defence was offered it might have been expected that the learned Magistrate would there and then have convicted the accused.

I have already said, relying on *PP v. Lim Teong Seng & 2 Others* (*ibid* at p. 109 col 1 para 4 per Laville J) that the procedure at the close of the case for the prosecution in the subordinate Courts, in the Court of a Judge sitting alone, or with assessors, is governed by ss. 173(f), 180 and 190 of the Code, respectively. The wording of the statutory formula in all these three sections is the same and their meaning cannot be differentiated. Consequently, I derive analogical support from s. 173(h) of the Code, commented on by Cusson J in the above quoted passage of his judgment in *PP v. Lee Yee Heng*, for the view expressed in *Khoo Hi Chiang* on the effect of s. 180.

It follows, that the **purpose** of the maximum evaluation of the prosecution's evidence at the close of its case, it to enable the Court to determine whether a case beyond all reasonable doubt has been made out against the accused. I thought that the Supreme Court had also made this point clear in *Khoo Hi Chiang*.

How Does the Prosecution "Make Out a Case"?

Similarly, and again with respect, the Court in *Tan Boon Kean* had also misunderstood the meaning of the expressions **"the case for the prosecution"** and "no case against the accused" has been made out appearing in s. 180 of the Code. "The prosecution makes out a case against the accused" said Lord Diplock in *Haw Tua Tau* (*ibid* at p. 51 col 2 F lines 3 *et seq*), I would, interpolate, with respect, quite correctly, "by adducing evidence of primary facts. It is such evidence that the words "if unrebutted' refer to." The expression **"to make out a case"**, standing on its own, tells us nothing about

what standard of proof the trial Judge has to apply to the evidence adduced by the prosecution in determining whether the accused has a case to answer, and it is, therefore, in that sense ambiguous.

In my view, the expression "to make out a case" must mean "to make out a case" ***having regard to the degree of proof demanded by the law***, with regard to the particular issue which arises for decision. This test is based on the test laid down in the judgment of Brett J in *Bridges v. North Lond Rly* [1874] LR 7 HL 213 at p. 233. In that case, Brett J approved the following way of putting the matter: the test to be applied by the Judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue is for him to inquire whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain having regard to the degree of proof demanded by the law with regard to the particular issue.

Here, we have an express statutory provision, namely, s. 180 of the Code, which provides the answer to the question what is the standard of proof demanded by the law from the prosecution **"to make out a case"**. That answer lies in the effect of the crucial words of s. 180, which say "*if unrebutted*", ***not***, be noted, **"if it were to be accepted as true"**, as stipulated by Lord Diplock in *Haw Tua Tau* or "*if believed*" as stipulated in s. 163 of the old Sarawak Criminal Procedure Code (Cap.58) for which see *PP v. Omar Lopez* [1967] 2 MLJ 281, read together with the four words which immediately follow them: "**would** warrant a conviction", **not**, be noted, "**could** warrant a conviction" or "**might** warrant a conviction".

The words "which if unrebutted would warrant a conviction" have been judicially considered in numerous Malaysian cases, and I had, in *Khoo Hi Chiang*, attempted a survey of a long line of these cases going back some 50 years. It will suffice, if I mention the decision of the Federation Court of Appeal in *Soo Sing & Ors. v. PP* [1951] MLJ 143, which was thought to have laid to rest any possible doubt there might have been regarding the correct interpretation of the quoted words. What the Court said there was this:

> Section 173 of the Criminal Procedure Code lays down the procedure to be followed by Magistrates in summary trials. The "evidence hereinbefore referred to" in para. (f) of that section [*in pari materia* with s. 180 of the Code] has reference only to the evidence given for the prosecution. That being so, it is the duty of a Magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, **has established the case against the prisoner beyond all reasonable doubt.**"

Indeed, in *V. Daniel v. PP* [1956] MLJ 186; Buhagiar J, had occasion to remark: "There is no doubt that *Soo Sing's* case put away any doubt that

there may have been as to the correct interpretation of s. 173(f) of the Criminal Procedure Code ..."

Subsequent to *Daniel's* case, there has been a consistent current of judicial opinion in this country applying the interpretation of the words "which if unrebutted would warrant a conviction" given in *Soo Sing*, and many of these cases are referred to in *Khoo Hi Chiang*.

It follows, that **"to make out a case"** to answer, the prosecution must have adduced evidence of primary facts, which, if unrebutted, **has** established the case against the accused **beyond all reasonable doubt.** (See *Soo Sing & Ors. v. PP* (*ibid*)).

In deciding whether the prosecution has succeeded in this task, the Court must inevitably direct its attention to the offence charged and decide, at the intermediate stage, whether the prosecution has established the charge against the accused beyond all reasonable doubt. I am supported in this by the following passage in the judgment of Laville J in *PP v. Fong Ah Tong* and *Cheong Chi Shen* (*ibid*):

> The evidence which would warrant a conviction, if unrebutted, is evidence that satisfies the Court beyond all reasonable doubt that the accused is guilty of the offence charged or some lesser offence. The criterion therefore on which the Court must work is, if there is no more evidence has the prosecution proved its case beyond all reasonable doubt.

And this what our Court of Appeal said in *Hoh Keh Peng v. PP* [1948] 14 MLJ 3 at p. 4, col. 2:

> There is a positive duty upon the Judge under s. 180 of the Criminal Procedure Code to acquit the accused at the close of the prosecution if he is not prepared then and there to convict without hearing more. If an accused person is called upon for his defence he may be able to turn the balance in his favour; but he should never be called upon for his defence in a case of doubt so that he may convict himself by supplementing a weak prosecution case.

It follows that *Tan Boon Kean* placed undue stress on the word "case" in s. 180 of the Code, while ignoring the point that in order to determine whether the prosecution has established a case to answer, the trial Judge must inevitably have to direct his attention to the charge and decide whether the evidence led by the prosecution has established every ingredient of the charge beyond all reasonable.

The Singapore Court of Appeal Decision in Ng Theng Shuang v. PP

I now turn to consider the judgment of the Singapore Court of Appeal in *Ng Theng Shuang v. PP* [1995] 2 SLR 36, which prefers the opinion of Lord

Diplock in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 to that expressed in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265, on the question of the standard of proof required from the prosecution at the end of the presentation of its case in a non-jury trial.

In *Ng Theng Shuang*, the Court of Appeal in refusing to follow *Khoo Hi Chiang*, relied heavily on the assumption that the Malaysian Supreme Court laid emphasis on the words in s. 180 of the Criminal Procedure Code (Cap 6) "would warrant a conviction" thus ignoring the crucial words "if unrebutted" in s. 189(1), and as a result, arrived at the conclusion that only proof beyond reasonable doubt would warrant a conviction.

With all respect, if I may say so, the words "**if unrebutted**" in s. 180 of the Code, especially when taken together with the four words which immediately follow, to wit, "would warrant a conviction", go **not** to undermine but to ***fortify*** the conclusion arrived at in *Khoo Hi Chiang*, for the reasons appearing in the section of this judgment bearing the sub-heading: *"Haw Tua Tau Equates the Words 'If Unrebutted' With The Words 'If Accepted' - Is That Right?"*

The Brunei Court of Appeal Decision in Yeo Tse Soon v. PP

In the Brunei case of *Yeo Tse Soon & Anor. v. PP* [1995] 3 MLJ 255, the Court in preferring *Haw Tua Tau* to *Khoo Hi Chiang*, was greatly influenced by the consideration that "to make out a case" is not the same thing as to prove it beyond reasonable doubt. (see *ibid* at pp. 266 I to 267 A). With this, I regret, I am unable to agree for the reasons already stated when discussing *Tan Boon Kean.*

Next, the Court having rightly recognised that the words of the statute nowhere referred to **"a *prima facie* case"** then went on to construe the words of the statute as being apt to describe **"a *prima facie* case"** (at p. 266 D). With this, I regret I am unable to agree for the reasons stated when discussing *Haw Tua Tau*; in particular, my construction of the statutory formula **"which if unrebutted would warrant a conviction"** in s. 180 of the Code, as emphasised by the contrast it displays when compared with the corresponding statutory formula **"no evidence that the accused committed the offence"** in s. 214(2) of the Code, reinforced by the statutory formula "*could not safely convict*" in s. 214(3) of the Code, both these last two mentioned provisions being concerned with jury trials, the first governing the position at the close of the case for the prosecution and the second at any time after the case for the prosecution.

It was on the basis of the construction that the words of the statute were apt to describe a **"*prima facie* case"** that the Court went on to hold as follows (at p. 266 D to F):

> ... Once the prosecution has adduced evidence which reveals all the elements of the offence and which is not so completely discredited that no reasonable tribunal of fact could believe it, a case has been made out which if unrebutted would warrant a conviction. ***It is immaterial that the Judge or Magistrate may have doubts as to its credibility: the time is not appropriate for him to decide whether it is credible or not, subject only to the reservation that he must be satisfied that it could be believed which is a question not of fact but of law.*** That being so, there is no justification for distinguishing between the procedure to be followed in a trial by jury and a trial by Judge alone.

With respect, the above passage, more particularly, the portion emphasised, is flatly contradicted, by the comment appearing in the passage in *Archbold* (reproduced above), according to which, even in England, at the close of the case for the prosecution, a Judge of fact and law, has the **right** to acquit, if he does not accept the evidence for the prosecution "whether because it is conflicting or has been contradicted or **for any other reason.**" *Archbold* goes on to make the pertinent submission that the Practice Note by Lord Parker reported in [1962] All ER 448, (of which *Haw Tua Tau* is no more than an amplication) **must** be read in the light of the above comment.

It follows, therefore, that in a criminal trial held in Malaysia, before a Judge sitting alone who is Judge of fact and law, at the close of the case for the prosecution, the test to be applied in determining whether there is a case to answer, having regard to the statutory formula in s. 180 of the Code, is not whether the prosecution evidence "**could** be believed" - which is a question of law, but, whether or not the prosecution evidence **"is believed"** - which is a question of *fact*. This is because it is not permissible to treat the words of the statutory formula **"which if unrebutted would warrant a conviction"** as meaning no more than **"which if unrebutted could or might warrant a conviction".** With respect, for the reasons stated, the Diplock test in *Haw Tua Tau* does amount to rewriting the statutory formula in this manner, and so does the test in *Yeo Tse Soon*.

The other matters relied on by the Court for preferring the *Haw Tua Tau* test, have, I believe, been adequately dealt with elsewhere in this judgment.

Conclusion On the Standard of Proof Point

To sum up, therefore, so far as the standard of proof, on the prosecution, at the close of its case is concerned, I would uphold *Khoo Hi Chiang* and with the utmost respect, decline to follow *Haw Tua Tau, Ng Theng Shuang, Yeo Tse Soon* and over-rule *Ragunathan v. PP* [1982] 1 MLJ 138, *Munusamy v. PP* [1987] 1 MLJ 492, *Junaidi bin Abdullah v. PP* [1993] 3 MLJ 217 and *Tan Boon Kean v. PP* [1995] 3 MLJ 514.

Looking Back

Looking back, with all respect, if not for the appearance of *Haw Tua Tau*, Malaysian law would never have followed the principles enunciated by Lord Diplock in that case and thus taken a wrong turning. *Khoo Hi Chiang* had set Malaysian law back on the correct path. Unfortunately, an attempt was made in *Tan Boon Kean* to resurrect *Haw Tua Tau*. Fortunately, the present appeal has afforded this Court the opportunity to make a final pronouncement on this vexed question.

The Merits of This Appeal

I must now direct attention to the merits of this Appeal.

In evaluating the testimony of the security guard, Ravi Shankar, the Judge rightly regarded as material the fact that this witness and the appellant were strangers. His Lordship then went on to conclude that such being the case, he could think of no reason why this witness should do such a vicious thing as to invent a story implicating the appellant in a capital offence. True it is that there was no animosity between the appellant and this witness, but if there was no reason on the one hand for a false accusation, there was equally no reason, on the other, for the appellant to run the unnecessary risk of making the highly incriminating disclosure alleged to a total stranger, whom he knew was a security guard, then to leave the brown bag with the cannabis in it virtually in the latter's charge while he went for a leisurely breakfast, well knowing that it would be the security guard's duty to report the matter to the authorities. The audacity of the alleged disclosure is lacking alike in cunning and contrivance. It is difficult indeed to associate simplicity so absolute with a course so perilous: the risks of detection were very great and the consequences of detection calamitous. Yet nowhere in his judgment did the Judge even mention these formidable factors which told in favour of the appellant. The Judge had thus failed to view the relevant facts from all angles and the appellant was undoubtedly prejudiced thereby.

I am thus reminded of what H.T. Ong FJ (as he then was) said in *Mahinder Singh v. PP* [1967] 1 MLJ 126, 128 para 3:

> There are certain other material facts too which could not be consistent with guilt. There admittedly was no animosity between the parties and the complainant himself could think of no reason why the appellant should have made the unprovoked attack on him. If there was no reason, on the one hand, for a false accusation, there was equally no reason, on the other, for the appellant to attack his inoffensive neighbour. The seriousness of the injury and the kind of weapon used should rather point to a vicious enemy and consequently, to a third party who had vanished as silently as he had appeared on the scene.

I must add, lest I be accused of an oversight that I have not overlooked the fact that there was also the evidence about the recovery of the appellant's Bank Nasional savings book, from the brown bag. It will be recalled that the appellant's story was that his bag was not the brown bag but the yellow bag. The driver Kabir contradicted this. The appellant may well have been lying about this. On the other hand, so may Kabir who was an obvious suspect, at least, the police thought so, for otherwise they would not have arrested and detained him for 14 days.

But, assuming that the appellant had lied when he denied ownership of the brown bag, that does not necessarily conclude the case against him, for the question remains: was the recovery of the rolls of cannabis and the Bank Nasional savings book from the brown bag, only consistent with the appellant's guilt? What if the rolls of cannabis had been planted there by someone else? There was ample time and opportunity for this for the brown bag lay unattended in the pondok and later in the driver's cabin for quite a while. There was no suggestion that either the brown bag or the compartment in the driver's cabin from which it was recovered was locked.

According to Insp. Ismail bin Dan, the police which consisted of five men, had proceeded to the factory in two vehicles, Insp. Ismail in his own car accompanied by Det./Cpl Amir while Insp. Wan Rashid, Det. Murad and Det. Saad, travelled in a police van.

On arrival at the factory, the police party did not proceed straightway to the lorry; instead, Insp. Ismail accompanied by Insp. Wan Rashid, proceeded to the office near the factory to seek the permission of its manager to conduct a search of the lorry but before doing so, Inspector Ismail had instructed his three men above-named to keep the lorry and those on it under observation. However, none of his three men were called to say that they had in fact carried out that instruction and, if so, what was the result of their observation. It was only after making that detour at the office that the police party approached the lorry. By which time, whoever the culprit was, the appellant or Kabir, would have had early warning of an imminent police strike, for how could they have missed noticing the arrival of the police van.

There was no suggestion that the behaviour of the appellant was in anyway abnormal at or about the time of his arrest.

This was a case where there were at least three persons on the scene, namely, the appellant, the security guard Ravi Shankar and the driver Kabir. Of the trio, the appellant was the youngest and the most vulnerable, being a lad of just 18 years, while Ravi Shankar and Kabir, were mature men, aged 23 and 38 years, respectively. And, although Ravi Shankar and the appellant were perfect strangers, the former did know Kabir.

Clearly, the Judge adopted an oversimplistic and Nelsonian approach to the case for the prosecution, in that he failed to take into account and/or to give proper weight to and/or to draw proper inferences from every fact which told in favour of the appellant, and thus, failed to review the evidence from all angles, with the result that a miscarriage of justice may well have occurred.

In these circumstances, the circumstantial evidence did not exclusively and inevitably connect the appellant to the cannabis, the subject matter of the charge and so the proverbial cap did not exclusively fit the appellant.

Summing Up

At the close of the case for the prosecution, it was manifestly clear that the star witness for the prosecution was the security guard Ravi Shankar and his story about the incriminating disclosure made by the appellant was improbable in the extreme, for the reasons stated and, quite frankly, unacceptable. Once this flaw in the testimony of Ravi Shankar is accepted as being of primary importance, the entire prosecution case must lose its sting. To quote H.T. Ong FJ (as he then was) in *Muniandy & Ors. v. PP* [1966] 1 MLJ 257: "the fact that this witness was unshaken in cross-examination was not *per se* an all sufficient acid test of credibility; the inherent probability of a fact in issue must be the prime consideration."

If, as I find, the evidence derived from the prosecution case itself was enough to suggest a reasonable possibility of a "plant", then neither the presumption of possession under s. 37(d) nor that of trafficking under s. 37(da) of the Act, could have operated against the appellant. Applying the "beyond all reasonable doubt test" to the evidence adduced by the prosecution, at the close of its case, it would have been wholly unsafe to convict the appellant of a capital offence, assuming he had elected to remain silent and to call no evidence.

To conclude, the misdirection in law by the Judge, in applying the wrong test when calling for the defence, may well have occasioned a miscarriage of justice, having regard to the unsatisfactory nature of the prosecution's evidence. He should, therefore, have ruled at the close of the case for the prosecution, that the evidence tendered by the prosecution was not strong enough to establish the case against the appellant beyond all reasonable doubt, that the appellant therefore had no case to answer, and acquitted and discharged him without calling for his defence.

Alternatively, if the presumptions were correctly invoked, the Judge ought to have held that the explanation of the appellant was both reasonable and probable and was sufficient to have created a reasonable doubt on the issue of possession, custody or control, of the rolls of cannabis, with the result that the presumptions were rebutted.

Lest I be accused of an oversight, in arriving at the above conclusions, I have kept in the forefront of my mind the principle enunciated by the Privy Council 84 years ago in *Khoo Sit Hoe & Ors. v. Lim Thean Tong* [1912] AC 323:

> Where upon an issue depending upon oral evidence there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial Judge, who has seen and examined the witnesses, **except where he has failed to observe inconsistencies or take account of material circumstances or probabilities.**

And, in the words of Lord Thankerton in *Watt Or Thomas v. Thomas* [1947] AC 488:

> It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

And again, in the words of Lord Thankerton in *Watt Or Thomas v. Thomas*, I am satisfied, that the trial Judge "has not taken proper advantage of his having seen and heard the witnesses."

Furthermore, I consider that the present case falls fairly and squarely within the following principles enunciated by the Supreme Court in *Gooi Loo Seng v. PP* [1993] 2 MLJ 137 at 142.

> Clearly, therefore, the trial Judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that the non-direction amounts to a misdirection, for, in the words of Pickford J in *R v. Bundy* (5 Cr. App. R. 270):
>
> > the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
>
> We must treat the failure of a trial Judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

For the sake of completeness, I must add that it was a specific ground of appeal that the record of appeal provided disclosed material omissions.

The principle that litigants as well as the appellate Court are entitled to complete and accurate copies of the appeal record is of such fundamental importance and so well known that it hardly needs emphasis.

A perusal of the record of appeal provided does indeed show that it is riddled with omissions, both in the notes of evidence, as well as in the notes of

argument, due I gather, to the illegible handwriting of the Judge, who is no longer in service.

Speaking for myself, I am unable to confidently say, that the appellant had not been prejudiced thereby, since the affected portions of the record relating to the evidence, might have contained material favourable to him to which we have been denied access. Bearing in mind that this Court has only the printed record to go by, it is, I think, impossible to rule out prejudice to the appellant who had been convicted of a capital offence.

In my view, therefore, there was substance in the complaint that the record of appeal suffered from material omissions, and hearing in mind the unsatisfactory nature of the prosecution's evidence, I would, on this further ground also, allow the appeal.

In these circumstances, it is unnecessary for us to pronounce on the other question of law which related to the sufficiency of the chemist's evidence.

Postscript

Since writing the above judgment I have had the advantage of reading the judgment in draft of Azmi FCJ wherein he has taken an opposite view to that I have taken on the question of standard of proof resting on the prosecution at the close of its case.

The first point in his judgment to which I should like to respond, is his conclusion that Lord Diplock's observations on the standard of proof resting on the prosecution at the close of its case are *ratio* and not *obiter*.

As Lord Diplock himself pointed out in *Haw Tua Tau* (see *ibid* at p. 146 E and F), the sole question for decision before the Board was whether the amendments to the Singapore Criminal Procedure Code, introduced by the Criminal Procedure Code (Amendment) Act 1976, which withdrew from accused persons the privilege which they enjoyed of making unsworn statements of fact without subjecting themselves to cross-examination were inconsistent with Article 9(1) of the Constitution of Singapore that: "No person shall be deprived of his life or personal liberty save in accordance with law", and being inconsistent, were rendered void by Article 4. (See [1982] AC 136 at p. 146 E and F). More particularly, the only rule alleged to be the fundamental rule of natural justice, against which the Act of 1976 which introduced the new procedure, was said to offend, was the so-called privilege against self-incrimination expressed in the Latin maxim *nemo debet se ipsum prodere*. (See *ibid* at p. 148 C). The Privy Council rejected this submission saying: "Their Lordships have no doubt at all that the amendments to the Criminal Procedure Code by the Act of 1976 are consistent with the Constitution of Singapore and are valid". (See *ibid* at p. 155 F).

It is true, that in the course of his judgment, Lord Diplock did consider and discuss the duty of the Judge, sitting alone, in deciding whether or not to call for the defence. However, the statutory provisions relating thereto, i.e. s. 188(1) of the Singapore Criminal Procedure Code, did **not** form part of the amendments made by the Act of 1976, and were not therefore necessary for the determination of the constitutional question hereinbefore mentioned.

The starting point is to define the expression "*ratio decidendi*". According to Cross, in his work *Precedent in English Law*, 4th Edn. p. 72, the description of what a *ratio* is, is this:

> The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the Judge as a **necessary step** in reaching his conclusion having regard to the line of reasoning adopted by him, **or a necessary part** of his direction to the jury.

The above definition had commended itself to the Court in *Beamish v. Beamish* [1861] 9 HLC 274 at 338; *Attorney-General v. Dean and Cannons of Windsor* [1860] 8 HLC 369 at 392; and *Jacobs v. London County Council* [1950] AC 361 at 369. Cross said as much in his work at p. 75 when he noted:

> It remains to consider some of the judicial statements which support our description of the *ratio decidendi* of a case as any rule of law expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion, or a necessary part of his direction to a jury. It is evident from the terms of Lord Campbell's speech in *Beamish v. Beamish* that by *ratio decidendi* he meant 'the rule of law which your Lordships laid down as the ground of your judgment'. In *Attorney-General v. Dean and Canons of Windsor*, the same Judge spoke of 'the rule propounded and acted upon in giving judgment. It is also clear from the terms of Lord Simonds's speech in *Jacobs v. London County Council* that he was thinking of the *ratio decidendi* in terms of 'a reason given by a Judge for his decision.'

I consider that Cross' description of what constitutes *ratio* is a most helpful guide and I would adopt it for the purposes of the present appeal. Going by that definition, unnecessary rulings make no precedents and *it is the Judge not the parties*, who decides what is *a necessary ruling*, that is to say, the true rule of law in the case. The fact, therefore, that Counsel in *Haw Tua Tau*, had raised the question **of** "*the standard of proof*" point as part of their contention that the amendments to the Code introduced by the Criminal Procedure Code (Amendment) Act 1976, which they enjoyed of making unsworn statements of fact without subjecting themselves to cross examination, and so violated Article 9(1) of the Constitution of Singapore, even if true, is *not* of decisive importance in determining the *ratio decidendi*.

What, however, *is* of decisive importance is that Lord Doplock did **not** treat his ruling on the burden of proof point as a necessary step in his conclusion that the amendments to the Criminal Procedure Code aforesaid were consistent with the Constitution of Singapore. (see Cross at p. 75).

Here is the precious little which Lord Diplock said on the effect of the trials Judges having applied to the prosecution's evidence, "*the beyond reasonable doubt*" standard of proof:

> Finally their Lordships would mention briefly, lest it be thought that they had overlooked it, the suggestion that at the trial of *Haw Tua Tau* the Judges may have taken literally those delphic passages in the judgment of the Court of Criminal Appeal in *Ong Kiang Kek v. Public Prosecutor* to which their Lordships have had occasion to refer. If this be so the only effect can be that the Judges applied to the prosecution's evidence a more regorious test of credibility than they need have done before deciding to call on *Haw Tua Tau* to give evidence. The error, if there was one - and there is nothing in the Judges' reasons for judgment to indicate what was the standard that they did apply - can only have been in favour of the accused.

In other words, Lord Diplock was applying his ruling on the standard of proof point, **not** to the constitutional question but to the **merits** of the appeal **only,** and in effect, saying that the misdirection in regard thereto, being in favour of the accused, could have occasioned no miscarriage of justice.

It is interesting to note that Counsel for the Public Prosecutor, Mr. Stuart Mckinnon QC, did say at the outset of his submission (see [1982] AC 136, at p. 144C): "Whether *Ong Kiang Kek v. PP* [1970] 2 MLJ 283 was rightly or wrongly decided is immaterial."

This brings me to may **second point**. In his book *Precedent in Law*, Mr. Laurence Goldstein has said (at p. 180): "A ruling which is a *ratio* has indeed to be sufficient for the purpose of settling a point of law **put in issue by the parties' arguments**; but that is subject to the point being, in the above stated sense, a point on which a decision is necessary for justification of the decision in the case." This implies that to qualify as ratio a ruling must be on a disputed point of law. The correctness or otherwise of *Ong Kiang Kek* was never put in issue by the parties since Counsel on both sides stood on common ground in contending that it had been wrongly decided. On this further ground, also, the observations by Lord Diplock on the effect of s. 188(1) of the Criminal Procedure Code; in particular, the standard of proof resting on the prosecution at the close of its case, should be regarded as *obiter*.

Thirdly, the distinguished Professor of Law, Tan Sri Ahmad Ibrahim, in an article entitled *Haw Tua Tau v. PP - Duty of Court at End of Prosecution Case - Must We Follow the Privy Council?* (see [1981] 1 JMCL 223) opined that Lord Diplock's observations on the standard of proof point were *obiter* and should be rejected.

On a further ground, also, it is significant that in *Haw Tua Tau,* both Counsel for the defence and the public prosecutor had contended that *Ong Kiang Kek* was wrongly decided. As a result, the Privy Council did not have the advantage of hearing arguments in support of *Ong Kiang Kek*. In other words, so far as this point was concerned, it was **not** really **argued on both sides**.

In such a situation, even Lord Diplocks's views on the burden of proof point are accorded the status of ratio, their force is significantly undermined. I am supported in this by what Lord Goddard said in *Nicholas v. Penny* [1950] 2 All ER 91 when sitting in the Divisional Court: "We can ... always differ from a case on the ground that it has not been argued on both sides."

In any event, if contrary to my primary view, even if Lord Diplock's observations on the standard of proof resting on the prosecution at the close of its case, are treated as ratio, in my respectful view, we should not follow them because his reasoning is open to the criticisms I have referred to earlier.

Next, Azmi FCJ has pointed out that when sitting as a Judge of the High Court, Penang, exercising appellate jurisdiction, I had myself, in *Pavone v. PP* [1984] 1 MLJ 77 followed *Haw Tua Tau,* but I had explained (at p. 79 col. 1) that I did so because I considered myself bound by the decision of the Federal Court in *Ragunathan v. PP* [1982] 1 MLJ 139 which followed *Haw Tua Tau.*

Azmi FCJ has also pointed out that in *Khoo Hi Chiang* there was unnecessary reliance on *Ong Kiang Kek*. With respect, a perusal of the judgment in *Khoo Hi Chiang* will show that this is not so.

Finally, the judgment of Azmi FCJ concentrates on a criticism of *Khoo Hi Chiang* (summarised at pp. 9 and 10) but, with respect, has left largely untouched the detailed reasoning of this judgment on the crucial question of the interpretation of s. 180 of the Code. As a result, he has placed undue stress on matters which are peripheral, thereby brushing aside the explicit provisions of s. 180 of the Code and their effect.

The Result

In all the circumstances, I would allow the appeal, quash the conviction, set aside the sentence of death and acquit and discharge the appellant.

Mohamed Dzaiddin Abdullah FCJ:

This is an appeal from the decision of the learned Judicial Commissioner of the Penang High Court dated 11 December 1992, who found the appellant guilty of an offence of drug trafficking under s. 39B(1) of the Dangerous Drugs Act 1952 (the Act) and sentenced him to death under s. 39B(2) of the same Act.

The appeal is against conviction and sentence. The substantive ground of appeal is, however, on a legal point, which is, that the learned Judicial Commissioner had seriously misdirected himself in law in relying on the principles in *Haw Tua Tau v. Public Prosecutor* [1982] AC 136; [1981] 2 MLJ 49; *Ragunathan v. Pendakwa Raya* [1982] 1 MLJ 139; and *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 in calling for the defence at the close of the case for the prosecution.

The learned Judicial Commissioner, in calling for the defence, applied the *prima facie* test based on the above three cases and stated that from the prosecution evidence, the ingredients of "possession" had been established at the close of the case for the prosecution. His Lordship, however, suspended in deciding on the question of the 'credibility' of the prosecution witnesses until the close of the defence case. This is what he stated in his grounds of judgment (p. 211 of the Appeal Record):

> Atas keterangan saksi-saksi tersebut saya memutuskan bahawa pihak pendakwa telah membuktikan satu kes *prima facie* mengikut prinsip yang dikandungi dalam kes-kes *Hwa Tua Tau, Ragunathan* dan *Munusamy* (kes-kes yang semua pihak tahu). Adalah jelas dari keterangan-keterangan tersebut unsur-unsur dan ciri-ciri pertuduhan tersebut iaitu milikan atau 'possession' oleh tertuduh telah *prima facie* dibuktikan pada peringkat penutupan kes pendakwa. Walaubagaimanapun atas prinsip *Hwa Tua Tau* dan kes-kes tersebut saya menggantung soalan kebolehpercayaan atau 'credibility' saksi-saksi pendakwa tersebut hingga penutupan kes pembelaan dan membuat penilaian apabila mengambil kira seluruh keterangan dari saksi-saksi pendakwa mahupun saksi-saksi pembela.

The learned Judicial Commissioner then considered the defence. After evaluating the evidence of the appellant and DW2, the witness offered by the prosecution, he came to the conclusion that the defence had failed to raise any reasonable doubt on the truth of the prosecution case that the appellant was in possession of the incriminating brown bag which contained ganja, or as to the prosecution's case. He held that the appellant had not rebutted the presumptions under s. 37(d) and (da) read together with s. 2 of the Act. In the result, he found the appellant guilty as charged.

Thus, the questions for the determination of this Court are these. First, did the learned Judicial Commissioner direct himself correctly in law when he held

at the close of the case for the prosecution that the prosecution had made out a *prima facie* case based on *Haw Tua Tau* principles, followed by *Ragunathan* and *Munusamy*, that there was some evidence which was not inherently incredible which the appellant should be called upon to answer. Secondly, whether from the evidence, the conviction under s. 39B(1) of the Act and sentence of death under sub-section 2 of the same section were justified.

Legal Issue

Encik Karpal, learned Counsel for the appellant, had contended before us that the learned Judicial Commissioner had applied the wrong test when he failed to direct his mind to the principles enunciated by the Supreme Court in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265 which is, that at the close of the case for the prosecution, his duty was to undertake a maximum evaluation of the evidence to determine whether or not the prosecution has established the charge against the appellant beyond all reasonable doubt. However, he seemed to have amplified his argument in his written submission that the case which if unrebutted would warrant a conviction within the provisions of s. 180, Criminal Procedure Code (the Code), must mean a beyond reasonable doubt case.

Puan Zaitun Zawiyah, for the Public Prosecutor, in her written submission, stated that in construing s.180 of the Code, we should not use a "beyond reasonable doubt" case or a "*prima facie*" case because the two expressions were nowhere to be found in the section. She suggested that we should follow the wordings of the section which provided for the accused to enter his defence if a case against him had been made out (and not proved) which if unrebutted would warrant his conviction.

Frankly, I am not impressed with this submission. We are here to decide whether the standard of proof under s. 180 is a "beyond reasonable doubt" case or a "*prima facie*" case and nothing more.

Before *Haw Tua Tau*, our Courts have interpreted the words of s. 180 of the Code to mean that it was the duty of the prosecution at the close of its case to establish its case beyond reasonable doubt. See: *Ong Kiang Kek* [1970] 2 MLJ 283 CA. However, following the landmark decision of the Privy Council in *Haw Tua Tau* in 1981, the duty of Judges and Magistrates at the close of the case of the prosecution must be the following:

> (The) judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding

> "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of s. 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance. (per Lord Diplock at p. 52).

What then was the effect of *Haw Tua Tau* with regard to our s. 180 of the Code? I need only reproduce what was stated by H.R.H. Sultan Azlan Shah (then acting LP) in *Ragunathan v. Pendakwa Raya, supra,* (at p. 141):

> Applying that principle, the learned Magistrate at the close of the prosecution case had to determine as a question of law whether on the evidence as adduced and unrebutted, the appellant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the Court, as a tribunal of fact that the applicant is guilty as charged.

Haw Tua Tau was later followed by the Supreme Court in *Munusamy v. Public Prosecutor* and much later in *Junaidi bin Abdullah v. Public Prosecutor* [1993] 3 MLJ 217.

Finally, in December 1993, a five-member panel of the Supreme Court (yours truly included) decided in *Khoo Hi Chiang* that the duty of the Court at the close of the case for the prosecution was to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible, i.e. the *Haw Tua Tau* test, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond reasonable doubt. In short, the Court declined to follow *Haw Tua Tau, Ragunathan, Munusamy* and *Junaidi. Khoo Hi Chiang* more or less reinstated *Ong Kiang Kek*. The Court was also of the view that Lord Diplock's interpretation of the Singapore's s. 188(1) of the Criminal Procedure Code was *obiter dicta*.

Two years after *Khoo Hi Chiang, Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456; [1995] 3 MLJ 514 emerged. The Federal Court of three Judges held that the "case" required to be established by the prosecution under s. 180 of the Code is a "*prima facie*" case and not "beyond reasonable doubt" case. The Court was of the opinion that if the "case" required to be established under s. 180 was a "beyond reasonable doubt" case, then the words "if

unrebutted" and "would warrant his conviction" would become redundant and meaningless. Further, it was of the opinion that there was no definitive ruling in *Khoo Hi Chiang* that the word "case" in s. 180 was not a *prima facie* case.

It is against the background of the conflicting *ratio decidendi* of *Khoo Hi Chiang* and *Tan Boon Kean* that this Court is asked to express its opinion on the meaning of s. 180 of the Code.

Section 180 states:

> When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

Thus, the primary question of law for our determination is: What is the standard of proof required from the prosecution under s. 180? Does the case 'which if unrebutted would warrant his conviction' mean a "beyond reasonable doubt" case or a "*prima facie*" case? After a careful reading of the draft judgments of my brothers, Mohd. Azmi and Edgar Joseph Jr. FCJJ and for reasons which I shall give shortly, I am of the opinion that it is a *prima facie* test, in a sense that there is some evidence, not inherently incredible, which constitutes a *prima facie* case. I must, of course, concede that the words "*prima facie*" appear nowhere in s. 180 or in the Code. I also note that the effect of these words has been discussed elsewhere. This means that I agree with the analysis and reasonings of my learned brother, Mohd. Azmi FCJ, in his draft judgment, and the inevitable conclusion that the case "which if unrebutted would warrant a conviction" found in s. 180 means a *prima facie* case. Short of repeating what has been said by my learned brother in his draft, I need only say that I concur with his opinion on the legal issue involved in this appeal, which I find was supported by a line of authorities, both local and from other common law jurisdictions. Of course, this is not the only reason.

My second reason is this. Since *Khoo Hi Chiang*, there have been at least two decisions, one from Singapore and the other from Brunei, which disagreed with *Khoo Hi Chiang*. The Singapore case of *Ng Theng Shuang v. PP* [1995] 2 SLR 36 has reiterated that the test propounded by Lord Diplock in *Haw Tua Tau* remained the proper test applicable to the Singapore's s. 189(1) CPC (the same as our s. 180 of the Code). I have had also the benefit of reading the following decisions of the Singapore Courts: *Sim Ah Cheok v. PP* [1991] 2 MLJ 353, *PP v. Gan Lim Soon* [1993] 3 SLR 261; and *PP v. Wong Wai Hung* [1993] 1 SLR 927.

After a careful reading of the above cases, I must admit that I have been greatly persuaded by their approach and reasonings with respect to the question

of the standard of proof at the close of the case for the prosecution. I whole heartedly agree with the practical approach of the learned Chief Justice of Singapore when he said in *PP v. Gan Lim Soon*, at p. 262:

> What these principles mean is that if the Judge comes to the conclusion after hearing the prosecution's evidence that there is evidence (not inherently incredible) which constitutes a *prima facie* case which the accused should be called upon to answer, he must call the accused to enter upon his defence.

Secondly, I find the Singapore Court of Appeal *Ng Theng Shuang* had carefully addressed itself on this crucial issue and gave reasons for disagreeing with *Khoo Hi Chiang*. Karthigesu JA, speaking for the Court, stated (at p. 41):

> It seems to us that the Malaysian Supreme Court laid emphasis on the words 'would warrant a conviction' in s. 189(1) of the Criminal Procedure Code thus ignoring the words 'if unrebutted' as this Court had done in *Ong Kiang Kek v. P.P.* and came to the conclusion that only proof beyond a reasonable doubt would warrant a conviction.

His Lordship, therefore, rejected the maximum evaluation test and concluded:

> We respectively agree with Lord Diplock that the crucial words in s. 189(1) of the Criminal Procedure Code, which deals with the procedure to be followed at the close of the prosecution's case, are 'if unrebutted'.

Then, reaffirming what was stated in *Sim Ah Cheok*, the learned Judge stated:

> Clearly, s. 189(1) calls for a two-stage process in a criminal trial and this can only be achieved if a minimum evaluation of the evidence is made at the close of the prosecution's case and this of necessity makes the question that the Court has to ask itself at the close of the prosecution's case a purely hypothetical one.

Common sense also tells me that this two-stage process in criminal trials is in accord with our adversarial system of fair trial.

Incidentally, the above cases have also persuaded me to change my mind after sitting on the *Khoo Hi Chiang* panel. The other reason being that at that point of time, I was also influenced by the fact that it was said that Lord Diplock's principles in *Haw Tua Tau* was *obiter dicta.* However, it has now been shown that it was the *ratio decidendi* of the case. See: Ruben J's article: *Standard of Proof Relating to Sufficiency of Evidence at Criminal Trials: Mental Gymnastics Since Haw Tua Tau* [1996] 2 CLJ lxiv. It must also be remembered that it is not uncommon for Judges, for good or better reasons, to change their minds or views on certain legal issues. To me, I call this judicial creativity, a function which we, the Judges, perform in the development of the law. The law must not be seen to be static.

Returning to the appeal, based on my opinion on the standard of proof required from the prosecution at the close of its case, which is, a *prima facie* test, it is my finding that the learned Judicial Commissioner had considered the prosecution evidence and came to a correct conclusion that there was evidence not inherently incredible to constitute a *prima facie* case within the principles of *Haw Tua Tau, Ragunathan* and *Munusamy*.

On the Evidence

Upon considering the evidence as a whole, in particular that of the appellant and the main prosecution witness, Ravi Shankar (PW8), I am satisfied that the appellant had created a reasonable doubt with respect to the issue of possession of 1396.7 grammes of ganja and in view of the failure of the learned Judicial Commissioner to make any specific finding of trafficking in the said ganja under s. 37(da) of the Act, the conviction and sentence cannot be sustained.

In the result, this appeal is allowed, conviction quashed and the sentence of death it set aside. The appellant is hereby acquitted and discharged.

Wan Adnan Ismail FCJ:

This appeal calls for the interpretation of s. 180 of the Criminal Procedure Code which provides as follows:

> 180. When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

Under this section the prosecution is obliged to make out against the accused a case if unrebutted would warrant his conviction before the accused can be called upon to enter on his defence. In my view the phrase "if unrebutted would warrant his conviction" describes the type or nature of the case that the prosecution is obliged to make out. If the Court is satisfied that the prosecution had succeeded in making out such a case then the Court shall call upon the accused to enter on his defence. If the accused does not tender any evidence at all the Court must convict the accused (see *PP v. Man bin Abas* [1939] 1 MC 160). Since in order to convict the accused the Court must be satisfied of the guilt of the accused beyond all reasonable doubt the Court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt.

Therefore it is my view that at the close of the prosecution case the trial Court must decide whether or not the prosecution had established the charge

against the accused beyond all reasonable doubt. If the Court is not satisfied that the prosecution had so established the accused must be acquitted forthwith (see *PP v. Lim Teong Seng & 2 Ors.* [1946] 12 MLJ 108). It follows that before the trial Court can call the accused to enter on his defence the Court must first be satisfied that each and every ingredient of the offence charged had been proved by the prosecution beyond all reasonable doubt. This by no means, means that the Court in calling the accused to enter on his defence has already made a finding on the guilt of the accused. The Court only finds that every ingredient of the offence has been proved beyond all reasonable doubt and that if there is no evidence in rebuttal at all the accused will be convicted on the evidence adduced by the prosecution. This is the first stage of the trial.

The second stage comes after the defence has been called. The defence can either rebut the prosecution evidence or raise a reasonable doubt as to the truth of the prosecution case. At the end of the defence case it is the duty of Court to consider the defence evidence in the light of the prosecution evidence. The Court considers the case as a whole. Then and only then the Court will make a finding on the guilt of the accused. This is pursuant to s. 183 of the Criminal Procedure Code.

I have had the benefit of reading the judgment of my learned brother Edgar Joseph Jr., FCJ and the judgment of my learned brother Mohd. Azmi, FCJ.

With respect, I concur with the judgment of my brother Edgar Joseph Jr., FCJ.

I agree that the conviction of the appellant be quashed, the sentence of death set aside and the appellant acquitted and discharged.

Reported by Gan Peng Chiang